

FILED**U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS****FEB 14 2005****DAVID J. MALAND, CLERK****BY
DEPUTY**1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF TEXAS
3 TYLER DIVISION3 UNITED STATES OF AMERICA,) Docket No. 6:71-cv-5281 WWJ
4 HEARNE INDEPENDENT SCHOOL)
5 DISTRICT)
6 vs.) Tyler, Texas
7 STATE OF TEXAS, ET AL) January 24, 20057 TRANSCRIPT OF TRIAL ON THE MERITS
8 BEFORE THE HONORABLE WILLIAM WAYNE JUSTICE
9 VOLUME I OF V

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25 Proceedings recorded by mechanical stenography, transcript
produced by computer.

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01:42:50 1 THE COURT: Morning, counsel. The Court calls Civil
01:42:57 2 Action No. 6: 71-CV-5281, The United States of America vs. The
01:43:07 3 State of Texas.

01:43:07 4 Who appears for the plaintiffs?

01:43:11 5 MR. HEPWORTH: Roger Hepworth, appearing on behalf of
01:43:15 6 Hearne Independent School District, and we're ready.

01:43:17 7 MR. CASPAR: Your Honor, my name is Edward Caspar for
01:43:19 8 the United States of America.

01:43:21 9 MR. GUZMAN: Javier Guzman, on behalf of United States.

01:43:24 10 MR. HEPWORTH: Should have introduced Sue Lee, one of
01:43:26 11 my attorneys, as well.

01:43:28 12 THE COURT: Thank you. Who appears for Defendant?

01:43:29 13 MR. FELDMAN: Your Honor, David Feldman and Rick Morris
01:43:31 14 of Feldman & Rogers for Mumford I.S.D.

01:43:35 15 THE COURT: You appear for?

01:43:37 16 MR. FELDMAN: For Mumford I.S.D. and Pete Bienski.

01:43:40 17 THE COURT: Very well.

01:43:42 18 MS. JUREN: Your Honor, I'm Nancy Juren, and I have
01:43:43 19 with me Ingrid Hansen from the Texas Attorney General's Office,
01:43:47 20 on behalf of State of Texas and the Texas Education Agency. And
01:43:51 21 also here today from the Texas Education Agency are their counsel
01:43:54 22 David Anderson and Sandy Lowe.

01:43:56 23 THE COURT: Very well. Thank you.

01:43:59 24 MS. JUREN: And, your Honor, if I might. I can't hear
01:44:01 25 you very well. I don't know if that microphone is working.

01:44:05 1 THE COURT: I don't. Now can you hear me?

01:44:13 2 MS. JUREN: That's better. Thank you.

01:44:20 3 THE COURT: Have the parties received the order that

01:44:23 4 was entered by the Court relating to the United States' motion to

01:44:31 5 quash a certain jury list?

01:44:35 6 MR. FELDMAN: No, your Honor.

01:44:36 7 THE COURT: I mean, witness list.

01:44:38 8 MR. CASPAR: No, your Honor.

01:44:39 9 MR. FELDMAN: We have not.

01:44:41 10 THE COURT: All right. Distribute it.

01:45:04 11 All right. Mr. Hepworth, you may proceed.

01:45:09 12 MR. FELDMAN: Your Honor, for the record, can Mumford

.:45:10 13 be heard on this motion? I realize the Court has --

01:45:13 14 THE COURT: I've ruled. There's no need for the --

01:45:17 15 that. Mr. Hepworth, you may proceed.

01:45:24 16 MR. HEPWORTH: Your Honor, there are a number of other

01:45:26 17 pending motions that United States and TEA have filed. We would

01:45:32 18 inquire if you would like those parties to put those forward at

01:45:36 19 this time. Additionally -

01:45:37 20 THE COURT: Well, is it necessary that we -- that I

01:45:40 21 determine these motions before we begin?

01:45:44 22 MR. HEPWORTH: Well, actually, none of the motions are

01:45:46 23 mine, so I'll let the people that have filed them address that.

01:45:49 24 And, additionally, in cooperation with the United States, we have

.01:45:54 25 -- and, really, all parties, we've determined that the United

01:45:56 1 States would go first, and then, Hearne would go second, if
01:46:00 2 that's okay with the Court.

01:46:02 3 THE COURT: That's all right. What other motions are
01:46:05 4 before the Court?

01:46:06 5 MR. FELDMAN: Yes, your Honor. Mumford has a motion
01:46:08 6 which is -- regarding the jurisdiction of the Court that we filed
01:46:14 7 over the weekend. I have an extra copy for the Court.

01:46:22 8 THE COURT: You filed it this weekend?

01:46:24 9 MR. FELDMAN: Yes, your Honor.

01:46:24 10 THE COURT: Well, you can object to the jurisdiction of
01:46:29 11 the Court at any time, so I guess I'll have to consider it. Hand
01:46:31 12 a copy of it to my clerk. You may proceed.

1:54:17 13 MR. FELDMAN: Your Honor, in the motion, as the Court
01:54:20 14 has read, we raise the issue of the language in your original
01:54:23 15 order which states that it is not applicable to any school system
01:54:28 16 that is under a prior desegregation order. That is the case
01:54:34 17 here. Hearne is under a prior desegregation order.

01:54:37 18 We believe that fundamentally, this raises an issue of
01:54:40 19 primary jurisdiction. If Hearne is to show in this court, as it
01:54:46 20 must, that -- or in this case, as it must, that the cumulative
01:54:51 21 effect of the transfers from Hearne to Mumford, or the transfers
01:54:57 22 out of Hearne was to reduce or impede desegregation in Hearne,
01:55:04 23 then that's a determination that ultimately must be made by the
01:55:09 24 Court with primary jurisdiction over a desegregation order.

01:55:11 25 That court, originally Judge Roberts, now Judge Nowlin,

01:55:17 1 had a -- in its original -- in its order language dealing with
01:55:29 2 transfers and that the transfers could not have a cumulative
01:55:29 3 effect of reducing or impeding desegregation. If this court were
01:55:31 4 to make a determination in this case, as it would have to in
01:55:32 5 order to provide relief to Hearne, that the cumulative effect was
01:55:37 6 to reduce or impede desegregation, then it would be invading the
01:55:42 7 province of the Court with primary jurisdiction.

01:55:45 8 Additionally, there also has to be a showing in the
01:55:50 9 context of the claims made by Hearne that there is a vestige of
01:55:55 10 discrimination present in Hearne I.S.D. But we know from the
01:55:58 11 case law that that vestige has to be related to the original
01:56:02 12 constitutional violation. Well, that original constitutional
01:56:05 13 violation was determined by another court. It would be that
01:56:08 14 court that would have the province to determine whether or not
01:56:10 15 there still is a vestige of that original constitutional
01:56:14 16 violation.

01:56:15 17 And, once again, if this court were to make a ruling on
01:56:19 18 that subject, it would invade the province of the Court with
01:56:21 19 primary jurisdiction. For all reasons stated, your Honor, we
01:56:25 20 would submit that the claims brought by Hearne have to be
01:56:29 21 dismissed from this case.

01:56:35 22 THE COURT: Does Hearne or the United States have a
01:56:37 23 position in this matter at this time?

01:56:44 24 MR. GUZMAN: Your Honor, on behalf of the United
01:56:49 25 States, we do object to the motion and would oppose its being

01:56:53 1 granted at this, or any other, time in this proceeding. The
01:56:56 2 motion essentially is premised on two bases, one being improper
01:57:00 3 venue in this case and, secondly, being subject matter
01:57:03 4 jurisdiction. With respect to venue, venue is a waivable defense
01:57:07 5 under Rule 12(h) of the Federal Rules of Civil Procedure. The
01:57:11 6 defendants in raising that issue, essentially the day before
01:57:13 7 trial, have waived that when it had multiple opportunities before
01:57:17 8 then to do so.

01:57:19 9 The question of the existence of the court order
01:57:22 10 governing Hearne, which is the basis for a venue objection, was
01:57:26 11 first raised by the United States, back in April of last year, on
01:57:29 12 their motion to enforce Court Order 5281 in this case. So at
01:57:36 13 that point -- excuse me, Mumford would have been in a position if
01:57:39 14 it felt it had a genuine venue objection to raise, it did not in
01:57:43 15 its first responsive pleading. It simply opposed our motion to
01:57:46 16 enforce on the merits. Even if you look at the next time that
01:57:50 17 the order was entered or was raised, that would have been in our
01:57:53 18 summary judgment motion that the United States filed on November
01:57:55 19 8th, and that instance, again, we reference the order and we also
01:57:59 20 attach it as an exhibit to support our summary judgment motion.

01:58:02 21 Again, there was no mention of the order made by Hearne
01:58:07 22 -- or, excuse me, by Mumford at that point. The first time
01:58:10 23 they've raised it, as they say in their pleadings, is that they
01:58:12 24 alleged to have found out about it on November -- later in
01:58:16 25 November, when Hearne responded to Mumford's summary judgment

01:58:20 1 motion and then, only came across the order in December, shortly
01:58:24 2 before Christmas, when Hearne made a supplemental production.
01:58:27 3 And that's just patently wrong. They've known about the order
01:58:29 4 since April of last year. They've had a copy of it since, at
01:58:33 5 least, November of last year. And at this point, it's simply too
01:58:36 6 late to raise the question of venue.

01:58:39 7 With respect to the question of subject matter
01:58:41 8 jurisdiction, the Court certainly has subject matter jurisdiction
01:58:44 9 to hear this case. This is a state-wide case, 5281 that was
01:58:49 10 imposed against State of Texas and Texas Education Agency. What
01:58:53 11 the -- what Mumford is doing essentially is selecting a statement
01:58:57 12 out of the Court's opinion from 1970, to say what the order, in
01:59:01 13 fact, does is not state-wide but carves out certain districts
01:59:05 14 that may have been under their own orders. I think, first of
01:59:07 15 all, you need to separate the court opinion from the court order
01:59:10 16 that sets forth what the parties were supposed to do or not do.
01:59:14 17 With respect to the Court order that was entered and
01:59:17 18 that's a second part of the 1970 opinion that's referenced, the
01:59:20 19 Court makes clear that TEA is not supposed to grant funding for
01:59:25 20 transfers that impede desegregation in the either sending or
01:59:30 21 receiving district. There's no mention of certain districts in
01:59:32 22 the state being carved out. That's also the case in 1973, when
01:59:35 23 the court amends its 1970 order. Again, it's simply a blanket
01:59:48 24 prohibition on funding certain types of transfers. There's no
01:59:48 25 mention of any carve-out.

01:59:48 1 The opinion itself does have the sentence that the
01:59:48 2 defendants or that Mumford quotes in it. But clearly, if you
01:59:50 3 read the context of that sentence and what the Court is dealing
01:59:53 4 with is with the state-wide violation that TEA itself was
01:59:57 5 engaging in conduct that may result in segregation or
02:00:01 6 perpetuating the dual system in districts throughout the state;
02:00:05 7 and that the only way to prevent that is to put the power in TEA,
02:00:10 8 since it had it statutorily to prevent transfers from crossing
02:00:14 9 school district lines that impeded desegregation.

02:00:18 10 Given that power and, also, the power of the
02:00:20 11 pursestring in terms of funding, it was going to be TEA itself
02:00:23 12 that would have that authority. This case essentially presents
1:00:26 13 that issue to the Court. We have a school district, Mumford, who
02:00:30 14 is losing students in a way that impedes the ability of Hearne to
02:00:34 15 operate its school system, in violation of 5281 because TEA
02:00:38 16 continues to fund the vast majority of those transfer students.

02:00:41 17 The action is properly before the Court to enforce
02:00:44 18 essentially its remedial orders in this case. We have nothing
02:00:47 19 further unless the Court has questions.

02:00:53 20 THE COURT: Thank you, counsel.

02:00:57 21 MR. GUZMAN: Thank you, your Honor.

02:01:01 22 MR. HEPWORTH: Your Honor, Civil Order 5281 has
02:01:04 23 uniformly been applied to Hearne over its existence. Hearne has
02:01:07 24 had to make the reports of how many transfers are going to
02:01:13 25 Hearne. We have been treated the same as other school districts

02:01:16 1 that we are under Civil Order 5281. Furthermore, I agree with
02:01:21 2 the waiver argument, won't repeat that. They've clearly waived
02:01:23 3 the venue portions of it.

02:01:26 4 You clearly have jurisdiction over Mumford. That's who
02:01:28 5 we sued was Mumford. Mumford's the one that's been violating the
02:01:33 6 order, and there's clearly jurisdiction over Mumford.

02:01:35 7 Furthermore, if they'd have brought this in a timely manner, at
02:01:39 8 some point in time -- I mean, we're supposed to even have ten
02:01:41 9 days to respond to this. So I don't think you even have to rule
02:01:44 10 immediately on it, but if they would have brought that a long
02:01:48 11 time ago, we could have certainly -- or the United States as a
02:01:52 12 party to the Austin order, they could have moved the Austin judge
02:01:54 13 to consolidate it over under your jurisdiction to make it clean
02:01:58 14 so there's not any question about it.

02:02:00 15 So we believe that you have jurisdiction over Mumford.
02:02:08 16 In effect, we could still do that; we could still get the Austin
02:02:11 17 court to transfer jurisdiction over during the pendency of this
02:02:13 18 or afterwards. So we submit that, number one, you don't have to
02:02:16 19 rule on that right now because, clearly, TEA, Mumford and the
02:02:20 20 United States are all proper parties to this, and whether or not
02:02:24 21 Hearne is, at a future date, you could determine that later on,
02:02:28 22 or we could have, if we wanted to clean up the record, filed a
02:02:31 23 motion with the Austin order to transfer jurisdiction over here
02:02:38 24 and that would clean it up, as well. Thank you, your Honor.

02:02:41 25 THE COURT: Any reply?

02:02:46 1 MR. FELDMAN: Briefly, your Honor. I would point out
02:02:47 2 that the United States' motion for production against Mumford
02:02:52 3 I.S.D. that was filed in April of this past year did not
02:02:56 4 reference the existence of a desegregation order. I've just
02:03:00 5 reviewed it again, sitting at this table. It's something I had
02:03:03 6 looked at this weekend, as well.

02:03:05 7 I would also point out to the Court, contrary to what
02:03:09 8 Mr. Guzman stated, in the amended order 5281, it does reference
02:03:15 9 the existence of other desegregation orders, specifically, in
02:03:21 10 paragraph A(4)(d). It states that when the -- as additional
02:03:38 11 guidelines that have to be considered by the TEA when it's
02:03:43 12 implementing your order, it has to consider a number of factors,
02:03:47 13 you know, including whether the receiving district or the home
02:03:49 14 district is composed solely of students of one race, ethnic
02:03:53 15 origin, et cetera. It also includes, specifically, whether the
02:03:56 16 sending or receiving school district is operating under the
02:03:59 17 provisions of another desegregation order. So, indeed, it is
02:04:03 18 referenced in the amended 5281 itself --

02:04:07 19 THE COURT: In your opinion, can jurisdiction be
02:04:13 20 waived?

02:04:15 21 MR. FELDMAN: No, your Honor, it cannot. If it is
02:04:18 22 brought before the commencement of trial, that is, in fact, the
02:04:27 23 courts have stated that it can be brought, subject matter
02:04:27 24 jurisdiction can be raised at any time.

02:04:27 25 THE COURT: Yes. I think you're right in that

02:04:27 1 connection. In reading Judge Roberts' order, which I thought was
02:04:34 2 admirable, I don't see any reference to the Texas Education
02:04:38 3 Agency nor do I see any reference to the matter of funding for
02:04:43 4 the district -- in the districts involved in this litigation.

02:04:53 5 MR. FELDMAN: If the Court will just give me a moment
02:04:57 6 to look at that order.

02:04:58 7 THE COURT: Yes, sir.

02:05:45 8 MR. FELDMAN: Well, your Honor, I certainly see that
02:05:49 9 the TEA was not a party to this case, and I had not suggested
02:05:55 10 that they were. And thusly, I don't see anything in here that
02:06:01 11 relates to the issue of funding. However, the Court does require
02:06:07 12 -- presumably, as part of its efforts to enforce the Singleton
02:06:15 13 time transfer provision in the order that the Court requires a
02:06:18 14 continual reporting by Hearne of the transfers in and out of the
02:06:24 15 school district.

02:06:25 16 THE COURT: Yes, sir. I'm sure of that. I will take
02:06:28 17 that -- I will take your motion under advisement. And in the
02:06:31 18 meantime, I request that counsel give me briefs on this matter
02:06:37 19 within two days. That ought to be enough time. If you have any
02:06:45 20 additional briefing to give the Court, I'd be pleased to receive
02:06:50 21 it.

02:06:51 22 MR. FELDMAN: Thank you, your Honor.

02:06:54 23 THE COURT: Having taken the motion under advisement,
02:06:57 24 let's proceed with the litigation. You may proceed, the United
02:07:02 25 States.

02:07:02 1 MS. JUREN: Excuse me, your Honor. If I might. There
02:07:04 2 is one clarification that I would ask of the Court. The order
02:07:09 3 that we received this morning addresses the United States' motion
02:07:14 4 to establish facts before trial.

02:07:17 5 THE COURT: Yes.

02:07:19 6 MS. JUREN: Actually, but the content of the order
02:07:22 7 addresses the United States' motion to exclude 54 "may call"
02:07:27 8 witnesses. The United States filed two separate orders, your
02:07:31 9 Honor -- excuse me, motions. One was to establish facts before
02:07:36 10 trial and one -- a different one was to exclude the 54 "may call"
02:07:41 11 witnesses. I'm concerned because this order, really, the content
02:07:47 12 of it addresses the United States' motion to exclude the 54
02:07:51 13 witnesses, but, yet, it's granting the motion to establish facts
02:07:58 14 before trial. So I'd like to clarify for the record that the
02:08:04 15 order is really directed toward the United States' motion --

02:08:14 16 THE COURT: Well, actually --

02:08:14 17 MS. JUREN: -- motion to exclude Mumford witnesses.

02:08:17 18 THE COURT: Actually, it covers both of those motions,
02:08:21 19 as I understand.

02:08:22 20 MS. JUREN: Your Honor, in regard to the motion to
02:08:24 21 establish facts before trial, the TEA did oppose that motion and
02:08:31 22 with respect --

02:08:32 23 THE COURT: What did you oppose?

02:08:34 24 MS. JUREN: A motion to establish facts before trial.

02:08:36 25 THE COURT: I know. But what in the -- what,

02:08:39 1 specifically, did you not agree was established before the trial?

02:08:43 2 MS. JUREN: Well, in the motion, the United States was
02:08:46 3 wanting to deem as facts in this record certain facts that they
02:08:51 4 laid out in their motion for summary judgment, which the TEA
02:08:54 5 opposed at that time. But -- and I could go into the detail, but
02:09:00 6 I wanted to bring to the Court's attention, also, that the
02:09:02 7 parties have reached stipulated facts that, I think, for
02:09:06 8 technical reasons have not yet been presented to the Court; that
02:09:11 9 I believe, also in talking to Mr. Caspar from the United States,
02:09:15 10 that would supersede the United States' motion to establish facts
02:09:19 11 before trial.

02:09:20 12 The stipulated facts that the parties have entered into
02:09:23 13 cover the -- pretty much the whole gamut of facts covered --
02:09:30 14 raised by this trial, and we would ask that those facts be
02:09:34 15 established on the record, as compared to the limited facts set
02:09:38 16 out in -- by the United States in their motion.

02:09:41 17 THE COURT: What says the government? Or what says the
02:09:43 18 United States?

02:09:44 19 MR. FELDMAN: Your Honor, may Mumford also be heard on
02:09:46 20 that, your Honor?

02:09:47 21 THE COURT: Yes. Certainly.

02:09:51 22 MR. CASPAR: Your Honor, we did file a motion to
02:09:52 23 establish facts, as well as a motion to exclude witnesses. We
02:09:57 24 filed a third motion with respect to Mumford's expert witnesses,
02:10:01 25 which the Court can address before Mumford would put on its

02:10:07 1 expert witnesses. Their motion asks the Court to exclude the
02:10:10 2 expert witnesses from presenting expert testimony because they
02:10:13 3 just don't have --

02:10:15 4 THE COURT: What I'm interested in, have you agreed
02:10:17 5 upon some stipulated facts?

02:10:28 6 MR. CASPAR: Absolutely.

02:10:28 7 THE COURT: As stated by counsel for the State of
02:10:28 8 Texas?

02:10:28 9 MR. CASPAR: We have not yet reviewed the final version
02:10:28 10 of the stipulated facts, but I anticipate agreeing to it, your
02:10:30 11 Honor.

02:10:30 12 THE COURT: Has Mumford been consulted in this regard?

02:10:33 13 MR. CASPAR: I think -- on the stipulated facts, I
02:10:35 14 think they have. Contrary to what counsel for TEA suggests,
02:10:38 15 however, the United States would not withdraw our motion to
02:10:40 16 establish facts. The facts that we alleged in our motion for
02:10:45 17 summary judgment, and which are not contested by any of the
02:10:48 18 parties, are fully consistent with the stipulated facts, your
02:10:53 19 Honor. We would not have stipulated to facts that contest -- or
02:10:57 20 that contradict them. And, indeed, there's more information in
02:10:59 21 the motion for summary judgment that we would ask the Court
02:11:01 22 establish.

02:11:03 23 THE COURT: Well, I'm asking counsel for the TEA to
02:11:08 24 tell me which of these established facts as set out in the
02:11:14 25 government's motion you say are not established facts.

02:11:18 1 MS. JUREN: Your Honor, it's as set out in the TEA's
02:11:25 2 response. There are a number of facts set out, purportedly, by
02:11:32 3 the United States that TEA had contested in its summary judgment
02:11:36 4 motion. The United States has represented that the facts were
02:11:41 5 uncontested, and, in fact, your Honor, the United States did
02:11:44 6 contest these facts. I believe the basis for --

02:11:48 7 THE COURT: You said the United States contested the
02:11:49 8 facts.

02:11:50 9 MS. JUREN: I'm sorry. The TEA contested certain facts
02:11:52 10 set out by the United States. The procedure under which the
02:11:57 11 United States brings this is Rules 56(d), which allows such a
02:12:05 12 thing only if there is no controversy over the facts, and that
02:12:10 13 TEA has contested certain of the facts. For example, the United
02:12:17 14 States made a statement in its statement of material facts that
02:12:21 15 it wants the Court to adopt that TEA operated in, acted in
02:12:25 16 concert or participation with Mumford in violating the court
02:12:28 17 order. That is one of the facts -- quote, unquote, facts that
02:12:32 18 the United States is asking this court to deem established.

02:12:35 19 The TEA offered ample evidence to demonstrate that it
02:12:40 20 has enforced the order and did not act in concert with Mumford.
02:12:46 21 That is one of the basic issues in this trial.

02:12:54 22 Next, the United States has asked that -- the United
02:13:12 23 States has stated that the cumulative effect of transfers from
02:13:18 24 Hearne to Mumford impeded Hearne's desegregation. The TEA has
02:13:23 25 explained the data the United States has offered does not support

02:13:26 1 this contention because the United States' calculations include
02:13:29 2 hardship transfers which the order excepts from consideration.

02:13:34 3 So the United States has -- excuse me. TEA has
02:13:37 4 contested that statement on the part of the United States. TEA
02:13:44 5 has also contested the facts claimed in three other of the United
02:13:51 6 States' statement of facts that TEA acted regardless of the
02:13:58 7 effect of its actions on desegregation in the state. As the
02:14:05 8 revised stipulations say, TEA concedes that it acted in
02:14:13 9 baselining certain students and in grandfathering certain
02:14:16 10 students -- they did that whether or not that the districts were
02:14:22 11 in compliance at that time, and whether or not the effects could
02:14:27 12 be considered to have reduced or impeded desegregation.

02:14:31 13 But the facts also show that TEA did have some regard
02:14:34 14 for what it was doing because it baselined and grandfathered in
02:14:39 15 the years 2000 and 2001, knowing through experience that whatever
02:14:45 16 those numbers were and those dates, the numbers would trickle
02:14:50 17 down through attrition, and that is, in fact, your Honor, what
02:14:53 18 the TEA will show, if pressed, in this lawsuit.

02:14:58 19 So that, also, is a statement that the TEA would not
02:15:03 20 want deemed established because it's something that had been
02:15:07 21 hotly contested. TEA also contested the facts claimed in
02:15:12 22 paragraph 66 of the United States' statement of facts that TEA --
02:15:24 23 let's see -- has informed Mumford that it was in compliance with
02:15:29 24 the federal court order. If I'm reading this correctly.

02:15:35 25 THE COURT: I didn't understand what you're saying,

02:15:36 1 counsel.

02:15:39 2 MS. JUREN: TEA further contests paragraph 66 of the

02:15:43 3 United States' statement of facts by pointing to the Court that

02:15:49 4 the letter referenced by the United States does not support its

02:15:53 5 contention. It's a question of that the United States'

02:15:57 6 documentation supporting what it's contending. The evidence that

02:16:07 7 the United States uses to support its statement is not without

02:16:18 8 substantial controversy because TEA has contested the support,

02:16:18 9 the documentation offered in support.

02:16:18 10 TEA has also contested the ultimate facts claimed in

02:16:22 11 paragraph 80 of the United States' statement of material facts

02:16:27 12 that TEA decided to withhold funding from Mumford for 71

1:16:33 13 transfers. Your Honor, I think I have to withdraw that

02:16:46 14 objection. I'm sorry. The TEA did withhold funding for 71

02:16:50 15 transfers. I'm not sure what I was thinking. I'm sorry.

02:16:55 16 Further, the United States had claimed that TEA relies

02:17:03 17 on Mumford to claim the appropriate amount of transportation

02:17:05 18 funding and to refrain from claiming any funding for

02:17:08 19 transportation -- for transporting transfers -- transfer students

02:17:12 20 that violate the court order; and that TEA cannot know whether

02:17:17 21 Mumford is claiming appropriate funding unless it does another

02:17:21 22 audit. TEA also contested that statement by the United States,

02:17:26 23 saying that it has good reason to think that the transportation

02:17:30 24 situation in Mumford has been addressed, and after the

02:17:37 25 transportation audit that was done a number of years ago that

02:17:40 1 Mumford has, in fact, reduced substantially the number of miles
02:17:44 2 in eight average daily ridership that it's claiming. So the TEA
02:17:50 3 contested the United States' statement there.

02:17:54 4 Essentially, your Honor, all of these statements that
02:18:00 5 TEA has taken issue with were statements that were contested. In
02:18:06 6 the briefing in the summary judgment, you know, probably, over
02:18:11 7 and over, and some of them are some of the basic issues in this
02:18:16 8 case. So TEA just simply asks that they not be deemed
02:18:19 9 established on the record before the trial because the rule
02:18:22 10 requires that there not be any substantial controversy and there
02:18:27 11 is.

02:18:29 12 There are a number of other ones that, I guess, there's
02:18:32 13 a couple more. Again, the question of whether TEA acted in
02:18:38 14 concert with Mumford came up again in some other paragraphs that
02:18:43 15 the United States wishes to have deemed established, and that
02:18:49 16 certainly is contested. The TEA struggled with Mumford and did
02:18:54 17 not act in concert with Mumford. The TEA did its best to get
02:19:04 18 Mumford to comply. And in many cases, there was not much
02:19:07 19 agreement between Mumford and TEA. So certainly TEA would not
02:19:11 20 want that deemed established before trial.

02:19:14 21 So for these reasons -- and, also, in addition to the
02:19:18 22 fact that the parties spent many, many, many, many hours working
02:19:23 23 on stipulated facts before trial and have come up, after many
02:19:28 24 drafts, with a set of stipulated facts, the TEA requests that the
02:19:32 25 Court deny the plaintiff, the United States' motion to establish

02:19:40 1 facts before trial as uncontroverted or without controversy and,
02:19:44 2 rather, look to the parties' joint stipulated facts that should
02:19:49 3 be filed and presented to the Court shortly.

02:19:53 4 THE COURT: Counsel for Mumford.

02:19:56 5 MR. FELDMAN: Yes, your Honor. First of all, I must
02:20:01 6 say that I had never seen Rule 56(d) utilized in this way. It
02:20:09 7 has always been my understanding -- and certainly it's the
02:20:11 8 understanding based upon the language of the rule -- that this
02:20:13 9 applies in cases where partial summary judgments are granted by
02:20:17 10 the Court. This Court itself so held in the case that's styled
02:20:25 11 United States vs. U.S. Postmaster General, 947 F. Supp, 282.

02:20:32 12 THE COURT: Which is a -- tell me, what did I hold in
02:20:35 13 that case?

02:20:36 14 MR. FELDMAN: Well, you --

02:20:40 15 THE COURT: I have no recollection of it.

02:20:42 16 MR. FELDMAN: I'm sorry, your Honor. I wouldn't
02:20:44 17 either.

02:20:45 18 THE COURT: It was the Eastern District, I assume.

02:20:50 19 MR. FELDMAN: Yes, sir, it was.

02:20:51 20 THE COURT: And what did I hold in that case?

02:20:53 21 MR. FELDMAN: You held that -- you granted a partial
02:20:55 22 summary judgment, and then, you said, a court may also grant
02:21:01 23 partial summary judgment by identifying any undisputed issues of
02:21:07 24 material fact. And, obviously, that's what you have to do if you
02:21:12 25 grant the summary judgment. Such facts are then deemed

02:21:16 1 established for trial.

02:21:20 2 And if you look at the face of the rule itself -- and
02:21:23 3 this is why I don't think I've ever seen this before -- it says,
02:21:26 4 first, in 56(d), it's entitled, case not fully adjudicated on
02:21:35 5 motion. Not fully adjudicated, obviously implying that there is
02:21:40 6 some adjudication. And it says, quote, if on motion under this
02:21:43 7 rule, judgment is not rendered upon the whole case or for all of
02:21:58 8 the relief asked and a trial is necessary, the Court at the
02:21:58 9 hearing of the motion by examining the pleadings and the evidence
02:22:02 10 before it, and by interrogating counsel shall, if practical,
02:22:08 11 ascertain what material facts exist without substantial
02:22:10 12 controversy and what material facts are actually in good faith
02:22:13 13 controverted.

02:22:15 14 That, your Honor, obviously, suggests that there would
02:22:18 15 be some ruling based on some uncontested or uncontroverted facts,
02:22:25 16 and then, those are deemed admitted or those are considered
02:22:32 17 uncontroverted for purposes of trial.

02:22:35 18 In addition to the procedural aspect of this motion, as
02:22:40 19 part of the summary judgment process, parties obviously assert
02:22:44 20 facts, and then, parties deny, oppose, controvert those facts.
02:22:50 21 It is impossible to read Mumford's response to the United States'
02:22:55 22 motion for summary judgment without drawing the conclusion that
02:22:58 23 Mumford is opposing factual assertions that go to the heart of
02:23:04 24 the case. In other words, ultimate facts.

02:23:07 25 And there are some of those in this -- the material

02:23:12 1 facts set forth by the United States in their motion now which
02:23:16 2 the United States asks the Court to deem adjudicated. For
02:23:21 3 example, No. 36 in the material facts states, Mr. Taylor, who is
02:23:25 4 the board president of Hearne, has learned -- lived in Hearne for
02:23:29 5 17 years, he has been a member of the Hearne Booster Club, many
02:23:33 6 of Mr. Taylor's coworkers from Hearne -- are from Hearne, and he
02:23:37 7 has spoken with them and other coworkers about Hearne I.S.D. on
02:23:42 8 various occasions. During these conversations, coworkers from
02:23:45 9 both Hearne and other school districts have noted that Hearne
02:23:49 10 I.S.D. has become a predominantly black school district because
02:23:52 11 of student transfers leaving the district.

02:23:55 12 It goes on to say, based on conversations with
02:23:58 13 coworkers and Hearne residents, and his familiarity with the
02:24:01 14 Hearne and surrounding communities, Mr. Taylor believes that this
02:24:03 15 is the general perception of Hearne I.S.D. in the community.
02:24:07 16 That would hardly be a fact that a court would accept as deemed
02:24:14 17 admitted. It's a matter of opinion in opposing the motion. We,
02:24:19 18 obviously, would oppose any kind of conclusion like that.

02:24:21 19 We have similar objections, your Honor, to No. 50 of
02:24:26 20 the material fact -- or objections in the sense that I don't see
02:24:29 21 how it's plausible to expect a party in response to a summary
02:24:37 22 judgment motion to necessarily address each and every factual
02:24:42 23 allegation. Specifically, there is no rule that requires that.
02:24:46 24 You can oppose a summary judgment motion. You can oppose the
02:24:50 25 factual conclusions that are reached or asserted in the summary

02:24:55 1 judgment motion, and that's what a lot of this is, factual
02:24:58 2 conclusions, not statements of fact but factual conclusions.
02:25:04 3 By way of example, your Honor, No. 50, moreover,
02:25:12 4 M.I.S.D. sends out information to parents on how new transfer
02:25:15 5 students can enroll. This information is intended for parents of
02:25:18 6 students who have not yet transferred to Mumford. That question
02:25:21 7 of intent is something that, obviously, the Court would under a
02:25:26 8 normal circumstance always have to reach a determination on.
02:25:29 9 No. 55, Bienski knew that he was misleading the TEA.
02:25:34 10 That is an ultimate factual conclusion for the Court to reach.
02:25:38 11 No. 68, M.I.S.D. misrepresented 31 childcare transfers, 31
02:25:46 12 healthcare transfers and 89 safety transfers. The issue of
02:25:49 13 misrepresentation is one for the Court to determine, and merely
02:25:53 14 asserting that kind of bald conclusion does not -- certainly
02:25:58 15 cannot lead to a fact being -- deemed admitted.
02:26:04 16 Likewise, with No. 69, it says, Bienski knew that for a
02:26:08 17 transfer to qualify for a hardship exception for childcare
02:26:11 18 reasons, there could be no childcare facility located in the
02:26:14 19 sending district. Well, that's disputed as to when he knew that.
02:26:18 20 Likewise, in No. 70 with respect to health transfers and No. 71
02:26:21 21 with respect to safety transfers.
02:26:23 22 For all the forgoing reasons, your Honor, and
02:26:27 23 particularly in light of all the time that the parties spent over
02:26:30 24 the last week on these joint stipulations, we would move that the
02:26:35 25 Court deny the United States' motion.

02:26:39 1 THE COURT: Yes, sir.

02:26:44 2 MR. CASPAR: Your Honor, I'm not going to take the
02:26:49 3 Court's time to go through each of these statements of fact that
02:27:02 4 the counsel has raised before you. There was a proper time to do
02:27:02 5 that, your Honor, and that was at the summary judgment stage.

02:27:02 6 We asserted facts in our statement of material facts,
02:27:06 7 and under the local rules, the other parties are required to
02:27:09 8 state genuine issues in response to those facts. Mumford stated
02:27:15 9 no genuine issues. TEA stated five or six. One of the ones
02:27:23 10 counsel for TEA has pointed out, we did not even include in our
02:27:28 11 motion to establish fact because we acknowledge that they
02:27:30 12 contested it. The other facts that TEA raised are not facts at
02:27:36 13 all, but they contest the legal conclusions from the facts. And
02:27:42 14 the same goes for Mumford. Mumford says that it cannot agree to
02:27:48 15 the idea that Mr. Taylor has an opinion. Well, the fact is that
02:27:54 16 he has an opinion. But Mumford doesn't agree with the legal
02:27:59 17 conclusion from that opinion.

02:28:01 18 Now, we're at somewhat of a disadvantage, your Honor,
02:28:04 19 because we didn't receive TEA's response to our motion, and so,
02:28:09 20 we can't know what facts they're referring to. But what we do
02:28:13 21 know is that they filed responses to our motion for summary
02:28:16 22 judgment, that Mumford's did not include a statement of genuine
02:28:20 23 issues, and they have not challenged any of the facts, putting
02:28:24 24 aside legal conclusions, that we alleged. And TEA did file a
02:28:27 25 statement of genuine issues. And if you look to those few that

02:28:30 1 they established or that they identified, they -- except for the
02:28:34 2 one that we left out, they had to do with legal conclusions from
02:28:36 3 the facts that we asserted.

02:28:41 4 Addressing counsel for Mumford's legal argument with
02:28:45 5 respect to Rule 56, indeed, counsel has said that in his
02:28:50 6 experience, he's never seen Rule 56(d) used this way before when
02:28:54 7 there hasn't been a ruling of partial summary judgment, at least.
02:28:58 8 Well, I can't speak to counsel's experience, but I can speak to
02:29:01 9 the experience of the Fifth Circuit, your Honor, and they have
02:29:03 10 seen such a case.

02:29:05 11 It's cited in our brief in Scott Paper Company vs.
02:29:08 12 Taslov, Incorporated. The Fifth Circuit says under federal --
02:29:12 13 under Federal Rule of Civil Procedure 56(d), if a court finds
02:29:16 14 that summary judgment is inappropriate because there are genuine
02:29:20 15 issues to be tried, it shall, if practicable, ascertain what
02:29:24 16 material facts exist without controversy and enter an order
02:29:28 17 specifying those facts. The facts determined under Rule 56(d)
02:29:33 18 will be deemed established at trial, even if there was no grant
02:29:37 19 of summary judgment or partial summary judgment.

02:29:40 20 Now, your Honor, the Court will do as it may, of
02:29:45 21 course, but I really must object to the other parties', you know,
02:29:52 22 bald defiance, really, of the Federal Rules of Civil Procedure.
02:29:56 23 We're operating by a certain set of rules, and the other parties
02:29:59 24 apparently are not. And we would just ask the Court to apply the
02:30:02 25 Federal Rules of Civil Procedure so that we're on a level playing

02:30:05 1 field.

02:30:11 2 Oh, and -- well, TEA raised this idea that they're not

02:30:17 3 -- that they're contesting this idea that they were acting in

02:30:19 4 concert with Mumford. Well, that's a legal conclusion. In fact,

02:30:22 5 that's not even something that's in our statement of material

02:30:25 6 facts. It's something that's a legal conclusion we say, later on

02:30:28 7 in the brief, based on the facts in our statement of material

02:30:31 8 facts that TEA does not contest. So for those reasons, your

02:30:34 9 Honor, we would respectfully ask that you grant our motion. The

02:30:37 10 motion is consistent with the stipulated facts, and there would

02:30:40 11 be no inconsistency. Thank you.

02:30:46 12 THE COURT: What is encompassed in this stipulated

3:30:49 13 facts?

02:30:51 14 MR. CASPAR: The stipulated facts, your Honor, go

02:30:53 15 through TEA's procedures for how they monitor transfers. They go

02:30:58 16 through a general history of this case, addressing Mumford's

02:31:06 17 handling of transfers issues, and their compliance with TEA

02:31:09 18 regulations, but they don't address a lot of the facts that are

02:31:15 19 alleged and asserted in our statement of material facts.

02:31:19 20 Together they would present a more full picture and

02:31:23 21 obviate the need for much litigation. Now, I would note that

02:31:26 22 lots of the facts that you heard counsel hear say they contest,

02:31:30 23 you will hear evidence at trial that they will not contest

02:31:33 24 because it's irrefutable, and they will have cost the Court's

02:31:38 25 time in having us put it on. Thank you, your Honor.

02:31:53 1 THE COURT: Well, I will, likewise, take under
02:31:56 2 consideration the opposition to the -- that have been stated here
02:32:07 3 this morning to the supposed issues or supposed facts that the
02:32:15 4 government has -- the United States has tendered.

02:32:20 5 What is the local rule that you refer to, counsel?

02:32:25 6 MR. CASPAR: Local rule 56(d), I believe, your Honor.

02:32:29 7 THE COURT: What does it provide?

02:32:30 8 MR. CASPAR: It provides that in asserting summary
02:32:36 9 judgment a party has to have a statement of material facts. And
02:32:38 10 in responding and/or objecting to a motion for summary judgment,
02:32:42 11 a party should have a statement of genuine issues identifying the
02:32:44 12 contested facts.

02:32:46 13 THE COURT: Now, you'll recall that this is an Eastern
02:32:49 14 District of Texas case.

02:32:49 15 MR. CASPAR: Yes, your Honor.

02:32:51 16 THE COURT: Are you referring to the local rules of the
02:32:52 17 Eastern District of Texas?

02:32:53 18 MR. CASPAR: Yes, your Honor.

02:32:55 19 MR. FELDMAN: Your Honor, one final point. There were
02:32:58 20 cross motions for summary judgment -- or motions for summary
02:33:03 21 judgment filed by all the parties. You know, certainly, if we
02:33:06 22 want to get into this, then the other parties could file similar
02:33:11 23 motions. But, in fact, when you have cross-motions, I believe
02:33:15 24 that the Court would have to consider the factual assertions
02:33:19 25 asserted by all the parties in their motions. And, indeed, in

02:33:25 1 the Mumford summary judgment motion, we were asserting facts
02:33:28 2 which contravene the facts that were being asserted by the United
02:33:32 3 States. And, I believe, this court's orders on the pending --
02:33:34 4 all motions for summary judgment was considering the facts in all
02:33:40 5 the motions for summary judgment.

02:33:44 6 THE COURT: Well, thank you, counsel. As I've stated,
02:33:47 7 I'll take that motion under advisement, likewise. Let's get on
02:33:51 8 with the case.

02:33:52 9 MR. FELDMAN: Your Honor, there's one more motion,
02:33:53 10 though. It's not my motion, but, as a practical matter, it
02:33:57 11 certainly affects me, and that is the motion filed to exclude
02:34:01 12 expert witnesses. I believe the United States has filed the
02:34:07 13 motion to exclude both of our experts, Michael Say, who would be
02:34:15 14 testifying about the qualitative analysis required to determine
02:34:19 15 whether or not transfers have a cumulative effect in reducing or
02:34:25 16 impeding desegregation, and Leslie Johnston, a demographer, who
02:34:30 17 provided some data with respect to census, et cetera, over a
02:34:34 18 period of time in Mumford and Hearne.

02:34:38 19 The reason why it's -- it is important for us
02:34:41 20 logistically to have that addressed is that one of those experts
02:34:46 21 is an out-of-state witness. It certainly would be most
02:34:51 22 convenient for the parties if we could have a determination as to
02:34:54 23 whether or not he's excluded before we -- the school district
02:34:59 24 would incur the expense of bringing him down here, or up here, to
02:35:03 25 testify before the Court.

02:35:06 1 The other factors involved that make this difficult and
02:35:09 2 require a ruling is that the -- Hearne is specifically offering
02:35:17 3 the reports of Dr. Say and Ms. Johnston as evidence in this case.
02:35:22 4 They have listed that -- or, excuse me, not the reports, but have
02:35:27 5 listed both of them as witnesses in their case. And, in fact,
02:35:32 6 the -- on the exhibits, they have specifically tendered Dr.
02:35:38 7 Johnston's report. So we are sort of caught between a rock and a
02:35:42 8 hard place here, your Honor, in determining how we would present
02:35:45 9 our case in light of these -- the motion that conflicts with the
02:35:51 10 assertions of the parties with respect to --

02:35:55 11 THE COURT: Does the attorney for Mumford desire to
02:35:56 12 reply?

?:35:59 13 MR. HEPWORTH: You mean Hearne, your Honor?

02:36:00 14 THE COURT: I mean Hearne.

02:36:04 15 MR. HEPWORTH: Your Honor, this isn't our motion. We
02:36:09 16 agree with the United States. We have not tendered the report.
02:36:15 17 Your Honor, so you'll know what the parties have done, we've
02:36:17 18 worked hard to have a joint list of exhibits to work from; and
02:36:21 19 then, once the exhibits were listed, then it was up to the
02:36:25 20 parties to put whether they objected to them or not.

02:36:27 21 We are not agreeing to the report of the demographer,
02:36:33 22 but we do agree to the underlying charts and statistics that are
02:36:37 23 in that report. I don't recall us proffering anything with
02:36:41 24 regard to Mr. Say. We object to, really, both of them as experts
02:36:48 25 and join with the United States in their motions. And with

02:36:51 1 regard to the joint stipulations of fact, we have filed those.
02:36:56 2 This morning when we got here, there were a couple of minor
02:36:58 3 changes that TEA wanted to make, and we ran it past everybody.
02:37:09 4 We will be filing an amended one; it's substantially the same as
02:37:09 5 the one we've already filed. It is lengthy. I believe there are
02:37:09 6 99 stipulations. That will help us a great deal. But with
02:37:12 7 regard to the experts, we agree with the United States: we don't
02:37:14 8 believe that they're proper expert testimony. Only thing we
02:37:18 9 really agree to is the demographer's reports that are taken from
02:37:21 10 the United States statistics. Thank you.

02:37:26 11 MR. FELDMAN: Your Honor, to expedite matters, Mumford
02:37:28 12 will agree that the demographer doesn't testify but her report --
02:37:32 13 or her numbers, her charts, as referred to by Mr. Hepworth, which
02:37:36 14 are attached to her report, that they come into evidence. We --
02:37:40 15 so we would stipulate to the charts that he's referring to that
02:37:43 16 are part of Dr. Johnston's report. We would withdraw Dr.
02:37:48 17 Johnston as a witness. We'd withdraw the remainder of her
02:37:51 18 report.

02:37:51 19 THE COURT: Well, what says the United States as to
02:37:53 20 this?

02:37:56 21 MR. GUZMAN: I'm sorry, your Honor, could you repeat
02:37:59 22 the question?

02:37:59 23 THE COURT: What is your position with reference to --

02:38:01 24 MR. GUZMAN: Let me make sure I understand. I have an
02:38:03 25 extra copy of the motion, your Honor. You want me to pass it up

02:38:05 1 to you. I'll be -- while I discuss it. If not, I'm happy to get
02:38:10 2 into what our position is specifically.

02:38:12 3 THE COURT: Just summarize for me what you're --

02:38:14 4 MR. GUZMAN: Sure. Our position, in a nutshell, is
02:38:16 5 that this isn't a case about that's an expert case, and it
02:38:19 6 certainly isn't about two experts that come up, one to tell you
02:38:22 7 what the law is and whether 5281 should remain in effect or not,
02:38:24 8 and another witness to come up and say that she performed
02:38:28 9 arithmetic on certain underlying data and then, came out with
02:38:32 10 certain end numbers from that.

02:38:33 11 There's -- I guess there's been some colloquy with
02:38:37 12 respect to the second expert, Ms. Johnston, and demographic data
02:38:41 13 that she pulled from publicly available sources. We objected to
02:38:45 14 both the reports as constituting hearsay and not being the proper
02:38:50 15 scope of expert testimony. But if -- we certainly would not
02:38:55 16 object to the underlying data from her report coming into
02:38:58 17 evidence in the case. If the rest of the report is withdrawn,
02:39:00 18 then we would not object to the report itself coming in. But
02:39:02 19 with respect to the merit of the issue, which is to say whether
02:39:05 20 these two individuals should be permitted to come in and testify
02:39:07 21 as experts, our position is that neither one should.

02:39:11 22 With respect to Dr. Say, this is the first we've heard
02:39:16 23 about he being -- him being proffered to testify about a certain
02:39:20 24 qualitative analysis that you do under 5281 to determine whether
02:39:24 25 transfer should be permitted or not. If you look at Dr. Say's

02:39:27 1 report, his three-page report that he submitted in this case, as
02:39:32 2 well as the deposition that he gave in the case, clearly what
02:39:36 3 he's opining about is what 5281 requires legally; and whether he
02:39:39 4 believes, in this day and age, 5281 should remain in effect.
02:39:43 5 Those are questions that invade the province of the Court. You
02:39:45 6 already have a set of lawyers on all sides to talk about those
02:39:48 7 issues. We don't believe that the Court needs an expert on the
02:39:50 8 stand to also offer an opinion, particularly when the expert
02:39:53 9 himself is not a lawyer either by training or degree.

02:39:56 10 THE COURT: What is his name?

02:39:57 11 MR. GUZMAN: His name is Michael Say.

02:40:00 12 THE COURT: Dr. Say, you referred to?

3:40:04 13 MR. GUZMAN: Yes. Correct.

02:40:07 14 THE COURT: If I understood what counsel was -- for
02:40:11 15 Mumford was saying, it is that they won't call the witness if his
02:40:18 16 charts are permitted.

02:40:19 17 MR. FELDMAN: That is with respect to the demographer,
02:40:21 18 Leslie Johnston, your Honor. And we will stipulate to that, that
02:40:24 19 only the -- her charts come in, and the report doesn't come in,
02:40:28 20 and she won't testify.

02:40:29 21 Dr. Say is a different matter. Looking at his report,
02:40:33 22 you can see that it refers to a qualitative analysis, doesn't use
02:40:38 23 that term. We know that's a term of art that comes from the
02:40:40 24 courts. But nevertheless, this is the same Dr. Say that this
02:40:44 25 court let testify in the Forest Springs case, back in the

02:40:49 1 mid-'90s.

02:40:51 2 THE COURT: The Forest Springs case.

02:40:53 3 MR. FELDMAN: Yes, your Honor. The cite on that is --

02:40:59 4 it involved the subdivision that was -- that existed between

02:41:02 5 Livingston and Goodrich, where -- on the border of Livingston and

02:41:07 6 Goodrich, and the subdivision was attempting to detach from

02:41:19 7 Goodrich and annex to Livingston. And you permitted Dr. Say to

02:41:19 8 testify in that case with respect to a number of matters. In

02:41:20 9 fact, he was quoted by the Fifth Circuit with reference to his

02:41:23 10 testimony on the tipping phenomenon in their decision in that

02:41:30 11 case.

02:41:30 12 He is a recognized expert in the area of desegregation.

02:41:34 13 He has worked in it for many, many years, and he would be

02:41:38 14 speaking to the qualitative analysis. We do not intend to

02:41:42 15 introduce through Dr. Say any matters that will be in the form of

02:41:42 16 pleading --

02:41:54 17 MR. GUZMAN: Your Honor, again, if that's the case,

02:41:54 18 this is the first we're hearing of it. If you look at Dr. Say's

02:41:57 19 report, it's clear what he says he's going to testify about, and

02:42:01 20 he reaffirms that in his deposition. Essentially it's this.

02:42:05 21 Three points. The court order transfer provision should not be

02:42:08 22 imposed, quote, so as to disallow parents to make a school choice

02:42:11 23 when that choice is not racially motivated. Essentially that's a

02:42:16 24 legal conclusion, saying that 5281 should not apply in this case.

02:42:19 25 Second, that Mumford, in particular, quote, should not

02:42:21 1 be subject to transfer provisions. Again, that's simply a legal
02:42:23 2 assertion. It's the same assertion that counsel for Mumford will
02:42:27 3 be making mostly, shortly, throughout the week of this trial.

02:42:29 4 Thirdly, while the transfers from Hearne to Mumford
02:42:33 5 exceed the court order's transfer percentage guidelines, that
02:42:36 6 impact is small compared to the impact already imposed on Hearne
02:42:39 7 by demographic changes. Now, it turns out in his deposition
02:42:42 8 testimony they amended that opinion to say that the changes are
02:42:44 9 actually on par between both demographics and the transfers. But
02:42:48 10 again, none of this goes to -- all of this goes to the question
02:42:52 11 of legal impact or legal opinion with respect to how 5281 should
02:42:58 12 apply in this case.

3:42:59 13 THE COURT: Well, the Court does not intend to consider
02:43:02 14 any matters regarded as inadmissible, even though it might be --
02:43:08 15 the Court may hear it. I'm going to hear that witness.

02:43:11 16 MR. FELDMAN: Thank you, your Honor.

02:43:15 17 THE COURT: All right. I think this disposes of the
02:43:16 18 preliminary matters.

02:43:17 19 MR. FELDMAN: Well, except one that I think would be
02:43:19 20 good news for the Court in terms of minimizing the trial.
02:43:22 21 Mumford would represent to the Court that it is withdrawing its
02:43:26 22 counterclaim against the Texas Education Agency.

02:43:28 23 THE COURT: Very well. The government may -- United
02:43:31 24 States may proceed.

02:43:33 25 MR. CASPAR: Your Honor, the United States is prepared

02:43:38 1 to go forward with an opening statement. If your Honor would
02:43:40 2 prefer, however, the parties skip opening statements, we're
02:43:44 3 prepared to put on our first witness.

02:43:46 4 THE COURT: Well, go ahead and make your opening
02:43:48 5 statement.

02:43:49 6 MR. CASPAR: Yes, your Honor.

02:43:52 7 PLAINTIFF'S OPENING STATEMENTS

02:43:55 8 MR. CASPAR: Your Honor, this case is about two
02:43:58 9 defendants who think that they are above the law, and it's about
02:44:03 10 one district devastated by student transfers. Hearne I.S.D. is
02:44:08 11 the district that's losing transfers, and it has been for several
02:44:12 12 years. The evidence will show that without the transfers, it
02:44:17 13 would be a diverse school district; no one ethnic group would
02:44:22 14 have the majority of the enrollment and; indeed, each ethnic
02:44:26 15 group would be significantly represented there.

02:44:28 16 But due exclusively to transfers, Hearne has become
02:44:31 17 racially isolated and racially identifiable as a black school
02:44:34 18 district. And you will hear witnesses testify to the effect that
02:44:37 19 that has had on Hearne socially, financially, academically. And
02:44:45 20 Hearne joins us in this case in asking the Court to enforce the
02:44:51 21 court order.

02:44:51 22 The court order in the desegregation case -- in this
02:44:54 23 case is the desegregation order from 1973, and that's the
02:44:57 24 applicable law here and that's the law that neither Mumford nor
02:45:01 25 TEA feel that they have to comply with.

02:45:04 1 Now, the court order provides that TEA can't fund any
02:45:08 2 transfers that reduce or impede desegregation in any district,
02:45:12 3 and the evidence will show your Honor that that's exactly what's
02:45:15 4 happening here. Hearne is losing the transfers and TEA is
02:45:19 5 funding them. Most of the transfers are going to Mumford.
02:45:22 6 Indeed, in the last several years, more than half of the white
02:45:28 7 resident population has left Hearne, and most of them have gone
02:45:31 8 to Mumford. Mumford, for its part, has made it easy for the
02:45:34 9 Hearne transfers. It runs all five of its buses, the evidence
02:45:37 10 will show, into Hearne to pick up these transfers and bring them
02:45:40 11 to Mumford.

02:45:42 12 TEA has regulations designed to ensure compliance with
02:45:53 13 the court order, but Mumford doesn't feel like it has to comply
02:45:53 14 with those regulations. The evidence will show -- that TEA's
02:45:54 15 regulations require each district in the State of Texas to report
02:45:58 16 to TEA the number of transfers they have each year, and to
02:46:02 17 identify each transfer and whether each transfer qualifies for a
02:46:06 18 hardship code to the court order. And your Honor will recall the
02:46:11 19 court order permits a hardship exemption. The evidence will show
02:46:14 20 that in 1998, Mumford told TEA that it had no transfers.

02:46:20 21 THE COURT: Had no transfers?

02:46:21 22 MR. CASPAR: Had no transfers at all whereas, in fact,
02:46:24 23 the evidence will show that Mumford had at least 143 transfers
02:46:27 24 that year, every single one of them from Hearne I.S.D.

02:46:31 25 The evidence will show, as well, that Mumford

02:46:34 1 resubmitted a transfer form for that year, identifying those
02:46:37 2 transfers. And a couple of months later, the evidence will show
02:46:41 3 that Mumford heard from TEA that the transfers were not allowed
02:46:47 4 by the court order because of their effect on Hearne's white
02:46:52 5 enrollment. TEA instructed Mumford not to take any more white
02:46:56 6 transfers from Hearne unless they had a hardship exception.

02:47:00 7 The evidence will show that the next year, when Mumford
02:47:04 8 submitted its transfer report, Mumford had even more transfers
02:47:09 9 and many more of them had hardship exceptions. The evidence will
02:47:13 10 show that the year after that, Mumford submitted another transfer
02:47:16 11 report with over 200 transfers, and every single one of them had
02:47:20 12 a hardship exception.

02:47:23 13 TEA got wise, at some point, and investigated Mumford
02:47:27 14 in 2002, and determined that Mumford had misrepresented 151
02:47:33 15 transfers as qualifying for a hardship. Despite this, TEA
02:47:39 16 decided to work with Mumford to figure out how many transfers
02:47:44 17 Mumford could take, no matter what. TEA calls this a baseline.
02:47:50 18 The baseline decision or the evidence will show that in 2000 to
02:47:57 19 '01 that TEA decided for that year, all the transfers that were
02:48:00 20 in any district could remain in those districts, no matter what
02:48:04 21 their effect on the racial enrollment at any other district. And
02:48:08 22 even though TEA had just determined that Mumford misrepresented a
02:48:11 23 bunch of hardship codes, they nevertheless worked with Mumford to
02:48:14 24 establish that 348 transfers that Mumford had in 2000 and 2001
02:48:21 25 could stay with Mumford, no matter what, and TEA would fund them.

02:48:26 1 The evidence will show, your Honor, that because of
02:48:28 2 that decision, there are in the last couple of years, and there
02:48:32 3 are today, transfers from Hearne who are white, and who are
02:48:36 4 impeding desegregation, and who don't have a hardship, that they
02:48:39 5 are in Mumford, and that TEA is funding them still, and that
02:48:42 6 violates the court order.

02:48:44 7 Now, TEA and Mumford are at odds a lot over the
02:48:49 8 transfer issue, obviously, but they are not at odds on one
02:48:52 9 matter. Neither one of them feels like they have to comply with
02:48:56 10 the court order. And the United States is here, your Honor, to
02:48:58 11 tell them that they do, that the court order is the law of the
02:49:01 12 land, and neither one of them is exempt, and it's designed to
2:49:06 13 protect districts like Hearne. And we ask the Court to enforce
02:49:09 14 the court order and protect Hearne from the deleterious effects
02:49:14 15 of the transfers on desegregation. Thank you, your Honor.

02:49:17 16 THE COURT: Does the TEA decide to make an opening
02:49:25 17 statement?

02:49:27 18 MS. HANSEN: Yes, your Honor.

02:49:28 19 THE COURT: Come forward.

02:49:30 20 MS. HANSEN: Thank you.

02:49:30 21 THE COURT: If you will identify yourself for the
02:49:32 22 record.

02:49:32 23 DEFENDANT'S OPENING STATEMENTS

02:49:33 24 MS. HANSEN: I will, your Honor. Your Honor, my name
02:49:36 25 is Ingrid Hansen. I'm an Assistant Attorney General. I'm here

02:49:39 1 on behalf of the State of Texas and the Texas Education Agency.

02:49:42 2 And may it please the Court, counsel.

02:49:43 3 The question in this case from the view of the Texas

02:49:48 4 Education Agency, your Honor, is did we properly enforce under

02:49:52 5 5281, and we believe we did for the following reasons. If I may,

02:49:57 6 your Honor, I'd like to step back for a moment and put this case

02:49:59 7 in what I think is its proper context, which involves, in some

02:50:02 8 respects, the context of 5281 in the 21st century and the impact

02:50:10 9 that it's having on rural small school districts in the State of

02:50:14 10 Texas.

02:50:15 11 In the year 2000, beginning of this century, Texas

02:50:20 12 became an urban state. We have over a thousand independent

02:50:23 13 school districts in Texas and some 200 charter schools. So

02:50:34 14 there's 1200 sets of reports that the Texas Education Agency

02:50:34 15 reviews every year for compliance with 5281. We are now an

02:50:35 16 urban-suburban state. We're not a rural state anymore.

02:50:39 17 Consequently, your Honor, the impact of 5281 falls,

02:50:43 18 practically exclusively, on very small districts. We have

02:50:47 19 numerous districts in Texas that have less than 100 students. So

02:50:50 20 the transfer of one student can trip the percentage balances in

02:50:56 21 the court's order. We do not believe -- TEA does not believe

02:51:00 22 that in that instance the transfer of one student requires

02:51:03 23 sanctions when our history and our experience has been that

02:51:08 24 ordering these districts and working with superintendents to

02:51:11 25 cease taking transfers, that in 99.9 percent of the cases have

02:51:16 1 been complied with through natural attrition, which you will also
02:51:20 2 see in this dispute between Hearne and Mumford, restores that
02:51:24 3 balance in a relatively short period of time.

02:51:26 4 You will hear in this case, and you have heard already
02:51:31 5 from the United States, only a table-thumping, I think, about the
02:51:34 6 baselining, and the grandfathering, and the enormous numbers of
02:51:39 7 students. What this court will look at in this trial and what
02:51:41 8 any order that results from this trial will be about is where are
02:51:48 9 we today, today in January of 2005. And where we are today, your
02:51:51 10 Honor, is that there are less than 50 students at Mumford that
02:51:55 11 the United States claims are being illegally funded by the TEA.

02:51:59 12 When the TEA made the decision about how much money to
?52:03 13 withhold from Mumford, because we did under the order sanction
02:52:06 14 them, and I believe it was appropriate and I believe the evidence
02:52:10 15 will show that it was appropriate. When we did sanction them, we
02:52:13 16 had to balance, your Honor, the number of students involved, the
02:52:17 17 disruption of the educational process of those students, the
02:52:20 18 impact on the families, as well as the financial impact on the
02:52:25 19 I.S.D; and that also see, based on our experience and our
02:52:29 20 history, whether over time these numbers were going to be
02:52:32 21 diminished. They have diminished substantially in this case
02:52:35 22 since TEA took sanctions.

02:52:37 23 THE COURT: I don't understand what you mean by when
02:52:39 24 you say that they were diminished. What are you referring to?

02:52:43 25 MS. HANSEN: What I mean, your Honor, is that by

02:52:45 1 attrition the numbers --

02:52:47 2 THE COURT: What do you mean by attrition in this
02:52:48 3 context?

02:52:49 4 MS. HANSEN: This will be the example. By attrition I
02:52:52 5 mean that students move all the time, and that some of these
02:52:54 6 students that the United States subjected to TEA's funding of are
02:52:57 7 no longer at Mumford, so they're not being funded at Mumford
02:53:02 8 anymore. The disparity between the resident student population
02:53:04 9 at Hearne and the student enrollment at Hearne has also
02:53:08 10 diminished to the point that in 2003 and 2004, after TEA took
02:53:13 11 sanctions, the disparity is down to seven percent.

02:53:16 12 I am not saying that that doesn't violate the one
02:53:19 13 percent in the court order. Of course it does, however, it's
02:53:22 14 more than just that mechanical formula that we have to look at.
02:53:26 15 The raw number of students the United States just spoke about,
02:53:30 16 348 students that were baselined by TEA today, less than 50 of
02:53:34 17 those remain at Mumford. And this is the point that I am trying
02:53:37 18 to make, your Honor, when I talk about attrition.

02:53:41 19 And as is obvious, I think, in the annual reports that
02:53:44 20 have been sent to this court, there are always some districts
02:53:47 21 that are out of compliance because of the way those percentages
02:53:51 22 work on small districts and the number of students. There were a
02:53:54 23 lot of students taken to Mumford that shouldn't have been taken.
02:53:58 24 There's no question about it. And I don't think anybody disputes
02:53:59 25 that.

02:54:00 1 What has happened now --

02:54:02 2 THE COURT: I would think that Mumford probably does.

02:54:05 3 MS. HANSEN: Well, I'm sure Mumford does, your Honor.

02:54:06 4 What has happened now with the automation of the system

02:54:09 5 is that there's, practically, instantaneous notification to the

02:54:14 6 district by accepting a certain student or certain number of

02:54:18 7 students that are going to trip the percentage in this order.

02:54:21 8 They can now choose to accept a transfer student that will not be

02:54:25 9 funded. This is all done automatically now.

02:54:28 10 At the end of the day, your Honor, I think that the

02:54:30 11 evidence in this case will show that this is really about money.

02:54:40 12 That we have these small school districts in areas that have a

02:54:40 13 declining population, and then, they're in competition with each

02:54:42 14 other to get students because they want the funding.

02:54:45 15 Hearne, I think, is complaining because they have less

02:54:48 16 money. Mumford, obviously, wants back the money that TEA

02:54:51 17 withheld. I think it's about money. But I think that TEA's

02:54:55 18 sanctioning of Mumford in this case was taken in good faith and

02:54:59 19 in compliance with 5281. It was reasonable and it was fair as we

02:55:04 20 tried to consider the impact, okay, of drastically withdrawing a

02:55:09 21 huge sum of money.

02:55:11 22 As I had mentioned earlier, although the United States

02:55:15 23 emphasizes that 50 percent of the whites left Hearne, it fails to

02:55:19 24 advise this court, and the evidence will show, not all of those

02:55:23 25 transfers went to Mumford. Many of those transfers went to other

02:55:26 1 surrounding districts, and there's no evidence in this case that
02:55:30 2 they were improper or not eligible under this court's order. I
02:55:33 3 think that's an important factor, your Honor. I think the United
02:55:36 4 States has skewed its statistics by counting every transfer out
02:55:40 5 of Hearne regardless of where that student went. It's not a fair
02:55:44 6 depiction of the effect of Mumford's actions.

02:55:48 7 When TEA discovers these kinds of violations they
02:55:51 8 normally do what's called a desk audit. They get on the
02:55:54 9 telephone, they talk to the superintendent, and 99.9 percent of
02:55:57 10 the time, as I mentioned, they work it out, and over the next
02:55:59 11 year or two, the balance is restored. That's because we have a
02:56:03 12 lot of mobility in these districts, as well.

1:56:07 13 I'm sorry, your Honor. I have to pause for a moment.
02:56:10 14 In light of the fact that Mumford has just now withdrawn their
02:56:13 15 cross-claims against us, I am kind of shifting some of my opening
02:56:17 16 statement here. But my point, also, is that in the two years
02:56:20 17 since the sanctions were taken, the balance of white students in
02:56:25 18 Hearne is returning, and that the history shows that the focus of
02:56:33 19 this kind of enforcement, which was explicitly approved by the
02:56:37 20 Department of Justice and the Office of Civil Rights in 1992 --
02:56:40 21 this method of enforcement was explicitly approved. And we're
02:56:45 22 going to put those documents in evidence -- that it was
02:56:48 23 reasonable for TEA to respond this way and to act this way. This
02:56:51 24 is what we've been doing since 1992. This is what we understood
02:56:54 25 was acceptable.

02:56:57 1 Further, I think it's important to note that today,
02:57:00 2 your Honor, neither Hearne nor Mumford is a one-race school, and
02:57:04 3 throughout the course of this dispute that really began in 1998,
02:57:08 4 neither one of them was or was becoming a one-race school. The
02:57:16 5 fact is that the bulk of these transfers started in 1998. I
02:57:20 6 think that, in and of itself, your Honor, is evidence of the fact
02:57:22 7 that it's not a vestige of -- of desegregation that this court
02:57:29 8 was concerned with in 5281. The segregative effect of those
02:57:33 9 improper transfers is lessening every day, and there's no
02:57:36 10 evidence that any person at TEA acted with any kind of racial
02:57:41 11 animus. I don't believe there's any evidence that anybody at
02:57:43 12 Mumford acted with any racial animus. And I submit to the Court
02:57:46 13 that the evidence will show that it's really about a dispute
02:57:50 14 about money and a struggle for these rural districts to survive
02:57:54 15 in an era of declining population and urbanization of this state.

02:57:58 16 This court's order under Section A(6) explicitly
02:58:02 17 authorizes the TEA to withhold funds when a district disobeys its
02:58:08 18 directives not to take any more transfer students. That's why
02:58:12 19 the sanctions were taken against Mumford and because Mumford
02:58:16 20 repeatedly ignored the directives from the TEA. I think it's of
02:58:21 21 prime importance, your Honor, that this court affirm the ability
02:58:24 22 of the Texas Education Agency to sanction a school district that
02:58:29 23 ignores it, that files false reports, and incomplete reports, or
02:58:35 24 fails to file at all. And, frankly, there were some public
02:58:38 25 defiance of this court's order. There was no secret that Mumford

02:58:42 1 didn't think the order should apply to it. I think the TEA is
02:58:46 2 entitled to sanction the school district that behaves in that
02:58:51 3 way. If we can't, your Honor, then there's no meaningful way to
02:59:05 4 enforce the order.

02:59:05 5 THE COURT: I had thought that the original order gave
02:59:05 6 you all the authority you needed.

02:59:05 7 MS. HANSEN: I believe it does, your Honor, and I
02:59:05 8 believe we acted appropriately under that authority, and that's
02:59:05 9 just the point I'm making. And thank you very much. I
02:59:05 10 appreciate it.

02:59:05 11 THE COURT: Mumford desire to make an opening
02:59:08 12 statement?

13 DEFENDANT'S OPENING STATEMENTS

14 MR. FELDMAN: Yes, your Honor, we do. For the record,
15 your Honor, Mumford would also invoke the Rule at the appropriate
16 time.

17 Your Honor, Mumford comes before the court, recognizing
18 that the record in this case is somewhat unique, but we ask the
19 Court to not view the case in a vacuum but, rather, as part of a
20 much larger whole. We ask the Court to consider the effect of
21 three decades of intervening Supreme Court and Fifth Circuit
22 jurisprudence, affecting the applicability and enforcement of
23 5281. And in that connection, we also ask the Court to consider
24 the following requisite burden of proof that must be imposed on
25 the United States and Hearne today, based on that intervening

03:00:17 1 authority and given the relief that they're seeking against
03:00:21 2 Mumford in this case.

03:00:24 3 First, that they must show that there is a vestige of
03:00:28 4 discrimination present in Hearne I.S.D. today and within the
03:00:36 5 relevant time frame, which basically runs from the mid-'90s to
03:00:40 6 the present day, and that this vestige of discrimination relates
03:00:45 7 back.

03:00:46 8 THE COURT: You said from the mid-'90s.

03:00:49 9 MR. FELDMAN: Yes, sir.

03:00:50 10 THE COURT: What are you referring to?

03:00:50 11 MR. FELDMAN: When the transfers began.

03:00:53 12 THE COURT: All right.

03:00:56 13 MR. FELDMAN: They also must show that this vestige of
03:00:59 14 discrimination relates to the original constitutional violations
03:01:04 15 for which they were placed under a desegregation order, which,
03:01:09 16 obviously, takes us into that primary jurisdiction issue.

03:01:13 17 We suggest to the Court that other than what Hearne has
03:01:17 18 asserted in its briefing that the vestige of discrimination is
03:01:21 19 the desegregation order, that that is no evidence of a vestige,
03:01:28 20 and that beyond that, there are no facts that show that there's a
03:01:31 21 vestige of discrimination at Hearne I.S.D. relating to its
03:01:35 22 original constitutional violation of establishing or maintaining
03:01:39 23 a dual school system.

03:01:43 24 From all the facts, we believe it will show -- that it
03:01:46 25 will be shown that Hearne I.S.D. is 20 -- excuse me, is 30 years

03:01:54 1 beyond the dual school system, and that, indeed, it is a unitary
03:01:59 2 system. In addition, as part of that burden of proof, once the
03:02:07 3 vestige of discrimination relating to the original constitutional
03:02:10 4 violation is shown, then both Hearne and the United States would
03:02:15 5 -- and, again, given the relief that they're seeking in this
03:02:17 6 case, they would then have to show that Mumford engaged in
03:02:21 7 intentional discrimination in connection with student transfers
03:02:26 8 such that there was state action that had the purpose of reducing
03:02:31 9 or impeding desegregation.

03:02:34 10 That state action element under Supreme Court and Fifth
03:02:37 11 Circuit authority today is essential. Private choices. We have
03:02:42 12 been told now, any number of times, by those courts, private
03:02:46 13 choices such as a decision to move, are not the basis for a
03:02:52 14 finding of that the effect is to reduce or impede desegregation.
03:02:58 15 A federal court in 2005 has jurisdiction over state action, and
03:03:03 16 that state action must be proven in this case.

03:03:14 17 In addition, your Honor, in the final of what we would
03:03:16 18 say is a three-prong burden of proof, Hearne and the United
03:03:19 19 States must then show that the cumulative effect of that state
03:03:24 20 action is state action by Mumford, not the action that may
03:03:28 21 involve other school districts which are not parties to this
03:03:32 22 case, who also accepted transfers from Hearne, particularly Gause
03:03:36 23 and Milano I.S.D; rather, the United States and Hearne must show
03:03:41 24 that Mumford engaged in state action which had the cumulative
03:03:46 25 effect of reducing or impeding desegregation at Hearne, and

03:03:52 1 viewed not nearly from a quantitative standpoint as the -- those
03:03:57 2 plaintiffs would have the Court do, but from a truly qualitative
03:04:02 3 standpoint, which requires that, amongst other things, we look
03:04:06 4 behind the raw numbers to determine what is happening in Hearne
03:04:11 5 to cause these transfers. And, rather, whether, indeed, the
03:04:16 6 racial identifiability of Hearne has been significantly altered
03:04:20 7 in the process.

03:04:21 8 The United States in its opening statement, in its
03:04:33 9 briefing, and similarly Hearne, always speaks in terms of black
03:04:33 10 students and white students. Somehow the Hispanic students have
03:04:35 11 gotten lost in the shuffle in their analysis. And somehow while
03:04:40 12 this court in 5281 spoke in terms of white versus minority, or
03:04:46 13 what was perceived at the time majority versus minority, rather,
03:04:53 14 they speak, Hearne and U.S., in terms of black and white.

03:05:00 15 No. Under your order, your Honor, we would
03:05:02 16 respectfully submit that the assessment always has to be white
03:05:06 17 versus minority, which in that order is defined to include
03:05:10 18 blacks, Hispanics, Asians, Native Americans, Pacific Islanders,
03:05:15 19 et cetera.

03:05:18 20 The United States also represents to the Court in its
03:05:22 21 opening statement that the black -- Hearne is now a predominantly
03:05:27 22 black school district. That Hearne now has a majority of black
03:05:32 23 students, but they've never had that before. Well, you will --
03:05:35 24 the Court will see that their own evidence in this case belies
03:05:38 25 that because, indeed, what their evidence shows, their statistics

03:05:44 1 show that we have stipulated to is that while the black
03:05:48 2 representation of Hearne for the Hearne student body was 52
03:05:53 3 percent in 1996-'97, indeed, the black percentage of Hearne and
03:06:00 4 the student body in 2003-2004 was 55.64 percent. So it has gone
03:06:08 5 from 52.08 percent to 55.64 percent. It's very difficult for
03:06:15 6 anyone to look at those raw numbers and say, well, gee, that
03:06:19 7 increases racial identifiability.

03:06:22 8 Again, they omit any discussion or determination with
03:06:29 9 respect to the Hispanic presence and the -- what we will show the
03:06:36 10 Court is how the Hispanic presence is a significant factor where
03:06:40 11 Hispanic students choose to live and where they choose to go to
03:06:44 12 school is a very significant factor.

1:06:47 13 THE COURT: Well, what is the -- what is your
03:06:50 14 understanding of the percentage of Mexican-American or Latino
03:06:57 15 students in the Hearne Independent School District and in your
03:07:03 16 school district?

03:07:05 17 MR. FELDMAN: Your Honor, in the Hearne School District
03:07:09 18 -- Mumford is currently 40 percent white, 60 percent minority.
03:07:19 19 And the representation of Hispanics is substantial amongst
03:07:23 20 that --

03:07:25 21 THE COURT: Well, I understand. Do you have a
03:07:26 22 percentage?

03:07:27 23 MR. FELDMAN: Yes, your Honor, I do. If the Court
03:07:29 24 would just give me a moment. You're asking for data for Mumford,
03:07:47 25 your Honor?

03:07:47 1 THE COURT: Both school districts.

03:07:49 2 MR. FELDMAN: All right. Would the Court like a spread

03:08:09 3 over a period of years?

03:08:10 4 THE COURT: Presently.

03:08:12 5 MR. FELDMAN: Presently, your Honor, the student

03:08:16 6 enrollment at Hearne I.S.D. is -- and this is as of 2003-2004,

03:08:24 7 because that's the last year we have data for -- is 55.64 percent

03:08:28 8 black; 31 -- or 30.96 percent, or 31 percent Hispanic.

03:08:39 9 THE COURT: 31 percent, you say?

03:08:41 10 MR. FELDMAN: Yes, sir.

03:08:42 11 THE COURT: At which school district?

03:08:43 12 MR. FELDMAN: At Hearne. And it is 13 percent white.

03:08:49 13 THE COURT: And what about Mumford?

03:08:51 14 MR. FELDMAN: At Mumford, your Honor, it is 45.5

03:09:10 15 percent Hispanic, 13.8 percent black, and 40.8 percent white.

03:09:23 16 The Hispanic population of Mumford is now and has, for a number

03:09:28 17 of years, been the predominant population.

03:09:35 18 The evidence will also show that a substantial number

03:09:39 19 of Hispanic students -- even though the resident population of

03:09:45 20 Hearne I.S.D., which is the -- a number that is arrived at by

03:09:52 21 taking the actual enrollment, subtract -- or adding back the

03:09:56 22 transfers, and then, taking away the transfers in, because each

03:10:01 23 year, indeed, Hearne has received transfers including more white

03:10:05 24 transfers than black transfers into its school district.

03:10:09 25 But looking at that resident population, which is a

03:10:12 1 very meaningful statistic that is ignored by the United States
03:10:15 2 and Hearne, what it shows is that it is the Hispanic population
03:10:21 3 that has remained relatively constant, and the black and white
03:10:26 4 population that has decreased. Now, that's the resident
03:10:30 5 population. That's not only kids going to public school at
03:10:33 6 Hearne, but going to public school elsewhere, as well.

03:10:38 7 And what the evidence shows is that 33 percent of the
03:10:42 8 Hispanic students in the Hearne I.S.D. community choose to
03:10:53 9 transfer out of Hearne. A third of that minority group chooses
03:10:54 10 to transfer out of Hearne. And even though the transfers to
03:10:59 11 Mumford have declined substantially since the imposition of the
03:11:04 12 TEA sanctions, lo and behold, the evidence shows that if those
3:11:11 13 students can't transfer to Mumford, they're transferring
03:11:16 14 elsewhere. They are not going back to Hearne, and that is true
03:11:18 15 of the black students who have transferred out. And,
03:11:22 16 incidentally, your Honor, the evidence will show that ten percent
03:11:24 17 of black students choose to transfer out of Hearne. But across
03:11:29 18 the board, the students that transfer to Mumford are now
03:11:34 19 transferring somewhere else, black, white and Hispanic.

03:11:43 20 Mumford has always been a Hispanic school district, if
03:11:48 21 we're looking at the predominant population. And as we look
03:11:51 22 at --

03:11:53 23 THE COURT: When was Mumford created?

03:11:55 24 MR. FELDMAN: Your Honor, I don't know the answer to
03:11:56 25 that question. Mr. Bienski?

03:12:01 1 MR. BIENSKI: 1925.

03:12:01 2 MR. FELDMAN: 1925.

03:12:02 3 THE COURT: And you say it was a Latino school at that

03:12:07 4 time? I mean, by that the transfer of students --

03:12:10 5 MR. FELDMAN: Throughout the '90s, it has been, your

03:12:11 6 Honor. I can't -- I cannot speak to 1925. I highly doubt in

03:12:15 7 1925 it was. I suspect in 1925, it was either all white or

03:12:21 8 predominantly white. We have --

03:12:26 9 THE COURT: When segregation was the rule of the day.

03:12:28 10 MR. FELDMAN: I'm talking about the actual population

03:12:30 11 of the town. Mumford only has about 300 people, your Honor.

03:12:34 12 THE COURT: How many?

03:12:34 13 MR. FELDMAN: Three-hundred people. And with the great

03:12:37 14 -- today, the great bulk of the population of Mumford consists of

03:12:41 15 individuals who work on the farms that are located in that area.

03:12:47 16 And that is one of the reasons why it so happens that the

03:12:51 17 population has been and remains substantially Hispanic in the

03:12:57 18 modern era.

03:13:00 19 If you look at Mumford today -- the testimony will show

03:13:03 20 that if you look at Mumford today, it is literally a laboratory

03:13:09 21 of diversity. It has 40 percent white, 60 percent minority. It

03:13:16 22 is a rainbow coalition throughout its grades. The evidence will

03:13:22 23 also show that the reason why students transfer there is not a

03:13:27 24 matter of white flight. Indeed, if there's any flight in this

03:13:32 25 case, it is enrollment flight, because students that are black

03:13:37 1 students, that are Hispanic, and students who are white have
03:13:41 2 chosen to leave Hearne I.S.D. to go to Mumford. And an
03:13:47 3 interesting statistic that we're going to also show this court is
03:13:50 4 that the transfers to Mumford, in particular, from Hearne are
03:13:56 5 more minority than majority when compared to the other school
03:14:00 6 districts. In other words, the transfers to the other school
03:14:03 7 districts are more predominantly white than they are to Mumford.
03:14:08 8 Mumford takes all comers and the population -- if you look at all
03:14:12 9 the students that transfer from Hearne, the minority students,
03:14:17 10 the Hispanic, and black students are going in substantial
03:14:20 11 percentages to Mumford, as opposed to other school districts that
03:14:23 12 are available in Robertson County.

3:14:27 13 So we ask this court to look at the burden of proof and
03:14:33 14 weigh the evidence, in light of the reality of what exists today.
03:14:41 15 The world, obviously, is a different place. And this is a world,
03:14:45 16 I believe, based both on the reality, on the ground, so to speak,
03:14:53 17 as well as the urging of our federal government and state
03:14:56 18 government that parents today are making choices about where they
03:15:02 19 educate their children, not based on race but, rather, based on
03:15:08 20 where is the best place for my child to get a good education.

03:15:14 21 And that's why the transfers going into Mumford have
03:15:19 22 been, are across the board. We also believe that the Court
03:15:27 23 should recognize in evaluating the burden of proof or evaluating
03:15:31 24 the evidence, rather, in connection with the burden of proof, as
03:15:35 25 I have indicated already, that it must view minorities versus

03:15:42 1 white, not simply black versus white.

03:15:45 2 THE COURT: Well, the record will reflect that this
03:15:48 3 court has had the problem of Latino students involved in other
03:15:58 4 litigation that came out of the U.S. against Texas. For example,
03:16:04 5 the controversy between the San Felipe Independent School
03:16:10 6 District and the Del Rio Independent School District, which ended
03:16:13 7 with the districts being consolidated. They're now San Felipe
03:16:27 8 Consolidated Independent School District.

03:16:27 9 MR. FELDMAN: I understand that. But this is a -- this
03:16:27 10 is truly a unique fact situation and I'd ask the Court to --

03:16:32 11 THE COURT: Nearly every case submitted to me is
03:16:35 12 unique.

03:16:35 13 MR. FELDMAN: I understand that, your Honor.

03:16:37 14 THE COURT: The Court will be in recess for 15 minutes.

03:17:53 15 (Recess.)

03:32:41 16 THE COURT: Yes, sir.

03:32:44 17 MR. HEPWORTH: May I make my opening statement, your
03:32:46 18 Honor?

03:32:46 19 THE COURT: Yes, sir. I thought all of them had been
03:32:48 20 made. Excuse me.

03:32:50 21 PLAINTIFF'S OPENING STATEMENTS

03:32:50 22 MR. HEPWORTH: I will be brief. Obviously, we're quite
03:32:53 23 aligned with the United States and agree with what they've had to
03:32:55 24 say.

03:32:57 25 Hearne has complaints against TEA and against Mumford.

03:33:01 1 And I'll try to not be too repetitive, but the complaint we have
03:33:04 2 against TEA is we found out these transfers were going on, they
03:33:08 3 were reducing the number of students we had, and particularly the
03:33:11 4 number of white students, and made a complaint in 1998 and
03:33:15 5 nothing was done. They sent us a letter back saying, we'll look
03:33:18 6 into it, and that's all we ever heard. They sent another letter
03:33:21 7 in 2001. And finally, in 2002, there was an investigation, but
03:33:28 8 in the meantime, they had grandfathered several hundred students
03:33:33 9 and allowed them to continue to attend. And, obviously, along
03:33:37 10 with the United States, we're saying that that's not proper to
03:33:40 11 allow all these students to continue to attend. And we're
03:33:44 12 talking about, you know, 100 to 150 white students. Mumford has
03:33:52 13 -- they have an enrollment of 450, but they only have 300 people
03:33:56 14 that even live there and fewer than a hundred people that are
03:33:59 15 actually students that live in Mumford.

03:34:03 16 The original order says that TEA is to withhold
03:34:05 17 funding, and if they continue to take white students, they're to
03:34:10 18 reduce their accreditation status. At one point in time, TEA
03:34:13 19 proposed to do that but then, backed off of it and never have.
03:34:18 20 The result of this is that if you have, just for example -- well,
03:34:25 21 Hearne got into an accreditation problem, and a lot of the reason
03:34:28 22 is because all of these transfers.

03:34:31 23 Mumford has adopted a policy -- they said they don't
03:34:35 24 enforce it, but they published it for four different years and
03:34:37 25 everybody believes it's their policy -- that they'll only take

03:34:40 1 students that have passed all sections of the TAAS or TAKS test.

03:34:46 2 THE COURT: They will what?

03:34:47 3 MR. HEPWORTH: That they will only take students that

03:34:48 4 have passed all of the state-wide assessment tests, the TAKS and

03:34:52 5 now the -- previously, the TAAS test and now, the TAKS. And

03:34:56 6 students who have no discipline problem and students who have no

03:35:00 7 attendance problems. Well, if you take -- you take 3 or 400

03:35:05 8 students, even 300 students under those guidelines, number one,

03:35:10 9 it's discriminatory against the blacks because not as high a

03:35:14 10 percentage of the blacks passed that state-wide assessment test.

03:35:17 11 So you're going to get a higher percentage of whites.

03:35:19 12 So that's discriminatory in itself. And, you know,

3:35:22 13 they're asking for state action is discriminatory. There it is.

03:35:26 14 What was the effect on Mumford -- I mean, on Hearne, they had too

03:35:33 15 high of a dropout ratio, therefore, became the only state -- or

03:35:38 16 the only school district in the state that was academically

03:35:40 17 unacceptable because of their dropout ratio. Well, if you take

03:35:45 18 400 students out of a district that's got a thousand students,

03:35:50 19 then you're leaving the ones that are most likely to drop out,

03:35:53 20 and you're taking 400 students. They're not going to drop out;

03:35:57 21 they've passed all the assessments of TAAS; they don't have any

03:36:00 22 attendance problems, any discipline problems. You've taken all

03:36:02 23 those people away and resulted in Hearne getting that rating,

03:36:05 24 which maybe further engenders the problem.

03:36:09 25 Had they not taken all of those -- for example, if

03:36:12 1 you've got 100 students and nine drop out, that's a nine-percent
03:36:16 2 dropout rate. If ten percent was the cut-off, if you're higher
03:36:22 3 than 10-percent dropout rate, you're academically unacceptable.
03:36:25 4 If you allow 80 students in the district and allow 20 of them to
03:36:29 5 transfer and you still have nine dropouts, all of a sudden,
03:36:32 6 you're more than ten percent, you're academically unacceptable.
03:36:36 7 So that's one of the impacts.

03:36:38 8 TEA has also talked about they grandfathered everybody
03:36:42 9 because of the financial impact that it would have to send these
03:36:55 10 students back. Well, what about the financial impact on the
03:36:55 11 school district that lost them? The school district gets about
03:36:55 12 \$5500 per student. If you only count the white students, if you
03:36:58 13 only had 100 of them, that would be \$550,000 a year. And there's
03:37:03 14 anywhere from 100 to 150 white students, anywhere from around 300
03:37:08 15 that are transferring down.

03:37:11 16 Mumford -- complaint we have against Mumford is they
03:37:16 17 wanted to take the law into their own hands. They did not follow
03:37:20 18 your order, even though it's a valid and existing order, because
03:37:23 19 they decided it shouldn't be any more, apparently. So they
03:37:26 20 didn't turn in any records from '92 to '98. No transfer records
03:37:31 21 whatsoever. '98, they filed a false one in June, saying they had
03:37:34 22 zero transfers when, in fact, two-thirds of their students -- I'm
03:37:38 23 not sure exactly two-thirds, but more than half of their students
03:37:40 24 were transfers. A lot of them were transfers.

03:37:43 25 Then, in -- later, in '98, they found out they had to

03:37:47 1 make these reports perhaps in response to the letter that we
03:37:51 2 filed complaining about the transfers. So they turned in a
03:37:55 3 report that said 143. That report wasn't accurate either. It
03:38:00 4 was about 20 people short, as shown by the records they produced.

03:38:03 5 There are fewer than a hundred resident students with a
03:38:08 6 population of 450, most of whom are from Hearne. The hardship
03:38:14 7 codes, they clearly knew what those codes were. They put in
03:38:17 8 false codes or allowed false codes to be presented. That is also
03:38:21 9 state action that shows discriminatory action. As far as the
03:38:30 10 white versus minority, if you even look at the white versus
03:38:35 11 minority including the Hispanics, you'll discover that more than
03:38:40 12 50 percent of the whites that live in our district are
03:38:43 13 transferring, most of them, to Mumford.

03:38:50 14 They say that Mumford is a laboratory of diversity.
03:38:54 15 It's a rainbow coalition. They're nice phrases. We used to be.
03:38:58 16 We used to have a pretty good mix. We used to have about 28,
03:39:02 17 29-percent white. Now we have only about 13-percent white. We
03:39:08 18 don't have that rainbow anymore very much because the whites are
03:39:12 19 fleeing. Thank you, your Honor.

03:39:18 20 THE COURT: All right. You may present your evidence.

03:39:22 21 MR. CASPAR: Your Honor, counsel for Mumford included
03:39:25 22 quite a bit of argument about the -- what we deem erroneous legal
03:39:29 23 standards to guide the case.

03:39:31 24 THE COURT: I'll hear that later. Let's get into the
03:39:34 25 case. I want to hear some evidence.

03:39:35 1 MR. CASPAR: Absolutely. Your Honor, the United States
03:39:37 2 calls Norris McDaniel.

03:39:39 3 THE COURT: I believe someone had asked for the Rule in
03:39:41 4 the case. Who was it?

03:39:44 5 MR. FELDMAN: Yes. I asked that the Rule be invoked,
03:39:45 6 your Honor.

03:39:47 7 THE COURT: Let all witnesses in the courtroom rise.
03:39:54 8 The witnesses have been placed under the Rule of the Court, which
03:39:57 9 means this: That you must leave the courtroom and remain outside
03:40:01 10 the hearing and presence of any of the proceedings in court.
03:40:06 11 While you are outside the courtroom, you do not discuss your
03:40:14 12 testimony with any of your fellow witnesses or with anyone else
03:40:19 13 except for the attorneys in the case. If you discuss the
03:40:24 14 evidence, your testimony with an attorney, it must be outside the
03:40:28 15 hearing and presence of the remaining witnesses. You may leave
03:40:31 16 the courtroom.

03:40:38 17 I ask the marshal to put the witnesses in the witness
03:40:42 18 room.

03:40:51 19 MR. HINOJOSA: Your Honor, my name is David Hinojosa.
03:40:53 20 I just wanted to note for the record I'm from MALDEF, I represent
03:40:54 21 the LULAC intervenors, and we're certainly pleased to be here
03:40:58 22 before the Court. And although we will be here in a monitoring
03:41:03 23 position in order to submit a post-trial --

03:41:07 24 THE COURT: You're perfectly -- the Court is willing to
03:41:09 25 hear anything you might want to submit.

03:41:12 1 MR. HINOJOSA: I'm sorry, your Honor?

03:41:12 2 THE COURT: I said the Court is -- this thing's not on

03:41:15 3 yet.

03:41:16 4 MR. FELDMAN: It's working now, your Honor.

03:41:18 5 THE COURT: I was thinking that if you have evidence to

03:41:20 6 present, the Court would be willing to go ahead and proceed.

03:41:24 7 MR. HINOJOSA: Yes, your Honor, we understand that.

03:41:25 8 But at this time, we're just going to be monitoring. We don't

03:41:28 9 intend to offer any evidence other than to submit post-trial

03:41:32 10 brief.

03:41:32 11 THE COURT: Very well. Your first witness. Come

03:41:38 12 forward, sir. Please take the oath. Raise your right hand and

3:41:43 13 be sworn.

03:41:44 14 (Witness was sworn.)

03:41:53 15 THE COURT: Sir, the witness stand is right over here.

03:42:10 16 Please proceed.

03:42:11 17 NORRIS MCDANIEL, called by the Plaintiff, duly sworn.

03:42:11 18 DIRECT EXAMINATION

03:42:21 19 BY MR. CASPAR:

03:42:21 20 Q. Mr. McDaniel, thank you for coming in today. Could you

03:42:21 21 introduce yourself to the Court?

03:42:21 22 A. I'm Norris McDaniel.

03:42:22 23 Q. Do you live in Hearne, sir?

03:42:24 24 A. Yes, I do, sir.

03:42:25 25 Q. How long have you lived in Hearne?

03:42:27 1 A. Just about all of my life.

03:42:30 2 Q. Did you grow up there?

03:42:31 3 A. Yes, I did.

03:42:32 4 Q. When were you born there?

03:42:33 5 A. I was born May 9th, 1942.

03:42:37 6 Q. Did you go to the Hearne schools?

03:42:38 7 A. Yes, I did.

03:42:39 8 Q. What schools did you go to?

03:42:41 9 A. I attended the Blackshear School.

03:42:44 10 Q. When did you graduate?

03:42:45 11 A. I graduated in May 1960.

03:42:50 12 Q. When you graduated, had the Hearne schools integrated yet?

3:42:54 13 A. No, they had not.

03:42:56 14 Q. So did you go to -- was Blackshear a black school?

03:43:00 15 A. Yes, it was. Blackshear was the all-black school.

03:43:03 16 Q. What did you go do when you graduated?

03:43:05 17 A. I graduated and went to college at Prairie View.

03:43:10 18 Q. Did you go through any kind of scholarship?

03:43:12 19 A. Yes, I did. Went on a football scholarship.

03:43:15 20 Q. How long were you at Prairie View?

03:43:17 21 A. Four years.

03:43:18 22 Q. What position did you play?

03:43:19 23 A. I played tight end.

03:43:21 24 Q. Did you do all right?

03:43:25 25 A. Kept my scholarship.

03:43:26 1 Q. That's good enough.

03:43:27 2 A. Yeah.

03:43:29 3 Q. After you graduated from Prairie View, what did you do then?

03:43:32 4 A. Then, I went to work in the Bryan Independent School

03:43:37 5 District for one year.

03:43:40 6 Q. That was in 1964?

03:43:42 7 A. 1964.

03:43:43 8 Q. When did you finally come back to Hearne?

03:43:46 9 A. I went back to Hearne in 1966.

03:43:54 10 Q. Had you lived there the rest of your life?

03:43:56 11 A. Yes. I lived there even while I worked in Bryan, sir.

03:44:03 12 Q. When did Hearne finally integrate schools the first time?

3:44:07 13 A. Hearne finally integrated 1968.

03:44:13 14 Q. And where were you then?

03:44:15 15 A. I was employed by the Hearne Independent School District.

03:44:18 16 Q. And what capacity?

03:44:20 17 A. I was a teacher and a coach at Blackshear School.

03:44:25 18 Q. Blackshear was the black school?

03:44:27 19 A. That's correct.

03:44:27 20 Q. After Hearne integrated, were you reassigned?

03:44:30 21 A. I was.

03:44:31 22 Q. Where did you go then?

03:44:32 23 A. I went to the Hearne High School.

03:44:37 24 Q. Was the Hearne High School the only high school in Hearne after integration?

03:44:40 25

03:44:41 1 A. Yes, it was.

03:44:42 2 Q. So did black students and white students go there?

03:44:44 3 A. Correct.

03:44:46 4 Q. What kind of school was the high school before integration?

03:44:51 5 A. It was the -- it was named the Hearne High School, and this

03:44:55 6 is where the white students attended school.

03:45:01 7 Q. How long were you at Hearne High School?

03:45:04 8 A. I was at Hearne High School until 1972, I think, sir.

03:45:12 9 Q. And then, what did you do?

03:45:13 10 A. Then, I was hired as an assistant principal for the

03:45:24 11 elementary and junior high grades.

03:45:27 12 Q. What years were you the junior high principal?

03:45:31 13 A. I was a junior high principal in 1974- '75.

03:45:36 14 Q. And in '75, where did you go?

03:45:38 15 A. In 1975, I went to work at Sam Houston State University as a

03:45:43 16 coach and a teacher.

03:45:45 17 Q. Did you come back to Hearne?

03:45:48 18 A. After one year, I was employed in Hearne as the elementary

03:45:57 19 principal.

03:45:58 20 Q. Was that Blackshear?

03:45:59 21 A. That was Blackshear Elementary.

03:46:02 22 Q. How long were you the principal of Blackshear Elementary?

03:46:04 23 A. I was principal at Blackshear Elementary for 20 years.

03:46:08 24 Q. 1976 to 1996?

03:46:10 25 A. That's correct.

03:46:11 1 Q. So you were living in Hearne and actually working at the
03:46:14 2 school district when Hearne first integrated?

03:46:16 3 A. Yes. That's correct.

03:46:18 4 Q. Could you describe the reaction in the community to
03:46:20 5 integration?

03:46:21 6 A. The community --

03:46:23 7 MR. FELDMAN: Objection, your Honor. It's over the
03:46:25 8 broad -- no foundation.

03:46:28 9 THE COURT: This is a hearing before the Court without
03:46:30 10 a jury. I'll hear the evidence. Overrule the objection. I'm
03:46:34 11 likely to overrule every objection that's made by any party. Go
03:46:38 12 ahead.

1:46:40 13 MR. FELDMAN: Does that mean you will?

03:46:43 14 THE COURT: As I've stated for the record, I do not
03:46:45 15 intend to give credence or, really, give any effect to any
03:46:52 16 evidence that I regard as inadmissible.

03:46:55 17 MR. FELDMAN: I hope the Court isn't offended if we do
03:46:58 18 object.

03:46:59 19 THE COURT: Oh, no. Make your objections. Go ahead.

03:47:02 20 Q. (BY MR. CASPAR) Sir, could you describe the reaction in the
03:47:04 21 community to integration in 1968 or 9?

03:47:07 22 A. The community did not respond openly to it, especially the
03:47:12 23 white community. The black community seemed real eager to get to
03:47:18 24 go to the, quote, high school. But the white community didn't
03:47:24 25 seem to accept it very well.

03:47:35 1 Q. Well, when the black students finally went to the previously
03:47:35 2 white high school, were they well received?

03:47:35 3 A. I think so. There were some problems, of course, when we --
03:47:40 4 when you put them all together, but then, it seemed like they
03:47:42 5 were received better by the students than the community overall.

03:47:48 6 Q. Did the black students ever at the high school ever express
03:47:52 7 dissatisfaction with being assigned to the white high school?

03:47:57 8 MR. FELDMAN: Objection, your Honor. Calls for
03:47:58 9 hearsay.

03:47:59 10 THE COURT: The objection's overruled.

03:48:01 11 MR. CASPAR: Your Honor, for the record Federal Rule of
03:48:03 12 Evidence 803(20) allows the witness to testify about historical
03:48:13 13 events in general according to the community.

03:48:15 14 A. State your question again.

03:48:17 15 Q. (BY MR. CASPAR) At some point, while you were at the high
03:48:18 16 school, did the black students ever express their dissatisfaction
03:48:20 17 with anything going on at the high school?

03:48:22 18 A. Yes. I remember in one case that was a -- I guess you could
03:48:27 19 call it a sit-in or sit-out demonstration and that lasted for a
03:48:32 20 few days. The concern -- some of the concerns I learned, later
03:48:37 21 on, were that there weren't any other black teachers at the high
03:48:48 22 school. Many of the black teachers that they had worked -- had
03:48:52 23 taught them were not there at the high school.

03:48:55 24 Q. You were a black teacher at the high school, right?

03:48:58 25 A. Yes.

03:48:58 1 Q. How many others were there?

03:48:59 2 A. I think there were -- I think there might have been three

03:49:03 3 others. Some were part-time, but there might have been three

03:49:07 4 others.

03:49:08 5 Q. How many high school teachers altogether?

03:49:11 6 A. I think there were over 25.

03:49:14 7 Q. And what was the reaction of the white students having to go

03:49:18 8 to Blackshear, the previously black school?

03:49:22 9 MR. FELDMAN: Same objection, your Honor.

03:49:25 10 THE COURT: I overrule the objection.

03:49:26 11 A. They really objected to going to Blackshear. And there was

03:49:31 12 talk from the high school administration that he felt that it was

3:49:35 13 better that the high school be relocated to the black community

03:49:40 14 so that the smaller children wouldn't have to go into the black

03:49:43 15 community if they thought the parents would accept that more

03:49:46 16 readily.

03:49:47 17 Q. (BY MR. CASPAR) So the Blackshear was an elementary school?

03:49:51 18 A. Yes. It was five through nine at that time.

03:49:56 19 Q. Did it -- was there a school that served earlier grades?

03:49:59 20 A. Yes, there was.

03:50:01 21 Q. Was that the east side?

03:50:02 22 A. East side.

03:50:02 23 Q. When you went to become principal of Blackshear, did this

03:50:08 24 sort of resistance from the white community continue?

03:50:12 25 A. Yes, it did.

03:50:13 1 Q. And throughout your 20 years as principal at Blackshear, do
03:50:17 2 you feel like it ever ended?

03:50:19 3 A. No, I don't.

03:50:20 4 MR. FELDMAN: Your Honor, could I have just a running
03:50:22 5 objection so I don't have to interrupt?

03:50:24 6 THE COURT: No running objection. If you want to make
03:50:26 7 an objection, go ahead and make it. I overrule your objection.

03:50:28 8 Go ahead.

03:50:31 9 Q. (BY MR. CASPAR) So did it ever go away, this resistance?

03:50:34 10 A. No, it did not.

03:50:36 11 Q. And what ways did it manifest itself?

03:50:40 12 A. There were parents who openly admitted that they didn't want
03:50:47 13 their children have to go into the community, and there were
03:50:55 14 other community members who voiced the same concerns.

03:51:04 15 Q. A few years or -- well, at some point, after you became
03:51:08 16 principal of Blackshear, did you have an occasion to decide
03:51:11 17 whether to start grouping students by ability?

03:51:14 18 A. Yes, I did. We kept up with the research, and the research
03:51:23 19 showed that heterogeneous grouping was the best method for
03:51:31 20 educating boys and girls in communities such as we have in
03:51:36 21 Hearne.

03:51:37 22 Q. Is that what you did when you first started as principal of
03:51:39 23 Blackshear?

03:51:40 24 A. Not when I first started, but a few years after that is when
03:51:44 25 we started, somewhere around 1980.

03:51:48 1 Q. Is when you started ability grouping?

03:51:51 2 A. We started ability grouping.

03:51:52 3 Q. So how did you feel about ability grouping?

03:51:54 4 A. I did not feel that ability grouping was the best

03:51:58 5 arrangement for our students at Hearne.

03:52:01 6 Q. Why not?

03:52:02 7 A. Because it isolated students from other students

03:52:07 8 academically and socially.

03:52:10 9 Q. What do you mean?

03:52:12 10 A. And whenever we are ability grouped, then you would end up

03:52:17 11 with, say, all of the white students in the upper groups, and

03:52:25 12 then, we have most of the minority and black students in the

3:52:30 13 lower groups.

03:52:31 14 Q. So the ability group, did it tend to segregate students by

03:52:35 15 race?

03:52:35 16 A. Yes, it did. It most certainly did.

03:52:38 17 Q. Why did you decide to start ability grouping around 1980?

03:52:43 18 A. Because the other campus ability grouped.

03:52:46 19 Q. When you say the other campus, do you mean the lower

03:52:58 20 elementary school?

03:52:58 21 A. The lower elementary school.

03:52:58 22 Q. Was that East Side School?

03:52:58 23 A. The East Side School ability grouped. And I was told, and

03:52:58 24 talking to the administrator, that the parents really liked it

03:53:00 25 and it's something that we should do because the children were

03:53:04 1 already accustomed to it, and they were also accustomed to being
03:53:07 2 with their friends and their associates. So they thought it
03:53:11 3 would take the pressure off of me, even if I would just consider
03:53:16 4 doing that.

03:53:16 5 Q. Did the principal of East Side tell you that?

03:53:18 6 A. Yes, he did.

03:53:19 7 Q. Well, was he white?

03:53:21 8 A. We, he was.

03:53:22 9 Q. Were there any other black principals in the district
03:53:24 10 besides you?

03:53:25 11 A. No. I was the only one.

03:53:29 12 Q. After you started ability grouping around 1980, what was the
03:53:33 13 effect in Blackshear of ability grouping?

03:53:40 14 A. It isolated the students, and I was never comfortable with
03:53:48 15 it because all the research I read it just never did show that we
03:53:50 16 would get our best results.

03:53:52 17 Q. Isolated students academically?

03:53:54 18 A. Academically and socially.

03:53:55 19 Q. And did it isolate students racially?

03:53:58 20 A. Yes, it did.

03:54:00 21 Q. For how long did you ability group after you started in
03:54:07 22 1980?

03:54:07 23 A. Seemed like to me we worked with that system for four years.

03:54:10 24 I think about four years.

03:54:15 25 Q. Why did you decide to stop?

03:54:17 1 A. Because continuing with the research and reading, I was
03:54:24 2 still getting more and more evidence that it was not the best way
03:54:26 3 to educate boys and girls. So we chose to stop.

03:54:34 4 Q. Why didn't you think it's the best way to educate boys and
03:54:39 5 girls?

03:54:39 6 A. One of the reasons is what I observed. In addition to the
03:54:42 7 research, I observed that when we had students mixed -- I
03:54:47 8 remember a specific case if you allow me to. We had students
03:54:51 9 mixed and there was a very, very bright student in a classroom,
03:54:58 10 and I noticed a nearly very, very bright student that was a very,
03:55:03 11 very challenging student, one who spent a lot of time in the
03:55:06 12 office with me, and he was what you would call disruptive. What
03:55:11 13 he did, he just interfered with the teacher, trying to teach. So
03:55:17 14 whatever he -- he didn't have his supplies, so then, I noticed he
03:55:22 15 would say Ms. Blank, I don't have a pencil. Well, then, the real
03:55:27 16 smart student there, so to speak, she had a pencil. She'd just
03:55:32 17 give him a pencil, and he'd get on with the work; and whatever he
03:55:35 18 needed, she just started providing it. So she took care of him
03:55:39 19 so that he could go on and get what she needed. And I thought,
03:55:42 20 my goodness, that was very, very good.

03:55:44 21 Then, another case, I observed a brighter student and
03:55:50 22 gifted student, so to speak. They were able to -- using the same
03:55:59 23 skill, we were able to get the gifted students to even work on
03:56:05 24 their skill but then, still help some other students who were
03:56:08 25 struggling and having trouble and in the simple things -- the

03:56:14 1 gifted student could devise games and things that children could
03:56:17 2 use, use high-order skill. They could do things like this and
03:56:22 3 still reap a lot of benefit, because when you have to teach
03:56:26 4 someone else, you definitely learn a lot.

03:56:28 5 Q. And that was under the heterogeneous grouping?

03:56:31 6 A. That is correct.

03:56:31 7 Q. That did not occur under ability grouping?

03:56:33 8 A. No.

03:56:35 9 Q. What other sort of social concerns did you have with respect
03:56:40 10 to ability grouping?

03:56:44 11 A. Social concern is just isolating it for the segregated the
03:56:50 12 students.

03:56:50 13 Q. You've testified that you -- correct me if I'm wrong.

03:56:54 14 A. Okay.

03:56:54 15 Q. You thought it was helpful for students of different
03:56:56 16 academic abilities to work with one another?

03:56:58 17 A. Correct. Yes, I did.

03:57:00 18 Q. Did you think there were any benefits to students of
03:57:03 19 different racial backgrounds to being together in the same
03:57:07 20 classrooms?

03:57:07 21 A. Yes. It was very beneficial. They learned to get along and
03:57:11 22 learned to work with each other and those -- I remember those.

03:57:17 23 Q. And that couldn't happen in ability grouping?

03:57:19 24 A. No.

03:57:19 25 Q. Well, when you stopped ability grouping, was it around 1984

03:57:22 1 or '85?

03:57:24 2 A. 1984, '85, that's right.

03:57:25 3 Q. When you stopped ability grouping, did that go over very

03:57:27 4 well with the parents in the community?

03:57:28 5 A. No, it did not. We had some opposition and teachers talked

03:57:35 6 to me, parents talked to me and started talking about things that

03:57:48 7 they would have to do such as leaving if we did not go back to

03:57:52 8 the grouping such as we had.

03:57:53 9 Q. What kinds of things were the parents talking to you about?

03:57:56 10 A. They wanted their children with their friends, and they

03:58:00 11 wanted certain teachers to teach their children. They didn't

03:58:06 12 want their children to go to certain teachers or to be with

:58:09 13 certain students.

03:58:11 14 Q. So, at some point, did you decide to go back to ability

03:58:15 15 grouping?

03:58:16 16 A. For a short period the pressure got to me, so I did it

03:58:20 17 again.

03:58:20 18 Q. Why did you decide to go back to it?

03:58:21 19 A. Because I feared that we were going to start losing

03:58:25 20 students.

03:58:25 21 Q. Did you fear that parents were going to start pulling their

03:58:28 22 kids out of the school?

03:58:29 23 A. Yes.

03:58:29 24 Q. And did you fear that parents were going to start

03:58:32 25 transferring their kids to some other schools?

03:58:35 1 A. Yes, I did.

03:58:36 2 Q. For how long did you ability group -- well, actually, let me

03:58:39 3 ask you this.

03:58:40 4 When you started ability grouping again, did you see

03:58:44 5 the same effects as before?

03:58:44 6 A. Yes, I sure did. Even worse.

03:58:48 7 Q. So did you see that -- well, tell me what those effects were

03:58:51 8 the second time.

03:58:55 9 A. I noticed that some children just -- the lower groups didn't

03:59:03 10 seem to even try. I have reports from teachers that they were

03:59:07 11 convinced that they were not going to do well. They had been

03:59:12 12 that way, they had been with their friends all the way through,

03:59:13 13 and they just wondered why they couldn't -- what would it take to

03:59:19 14 get with the other students because all of the years they've just

03:59:23 15 been with certain students.

03:59:26 16 Q. When you ability grouped again, was this in the mid to late

03:59:29 17 '80s?

03:59:30 18 A. That's right.

03:59:30 19 Q. When you ability grouped again, did it have that same sort

03:59:33 20 of segregated effect racially?

03:59:35 21 A. Yes, it did.

03:59:36 22 Q. Did it tend to create classes with mostly white students?

03:59:41 23 A. Correct.

03:59:41 24 Q. And did it tend to create other classes with mostly black

03:59:44 25 students?

03:59:45 1 A. That's correct.

03:59:47 2 Q. Well, how long did you ability group this time?

03:59:50 3 A. Maybe just a couple of years.

03:59:55 4 Q. Why did you stop?

03:59:57 5 A. Because research kept coming out and I kept reading, and

04:00:06 6 once I saw where there was a professor, Dr. Kennedy, in Virginia,

04:00:11 7 who published a grouping pattern, modified heterogeneous grouping

04:00:16 8 pattern.

04:00:17 9 Q. Modified heterogeneous grouping pattern?

04:00:20 10 A. Yes, uh-huh. So I thought maybe that would work because he

04:00:26 11 in Virginia -- I talked to him by phone. He told me he had some

04:00:29 12 of the same problems that I was faced with, and sharing with him

1:00:32 13 that I was concerned with losing students and people not thinking

04:00:38 14 that we were a good school.

04:00:41 15 Q. Had you read some of his articles?

04:00:43 16 A. Yes, I did read his articles.

04:00:45 17 Q. How did you come and talk with him?

04:00:46 18 A. By just calling the number that he had, then, in one of the

04:00:51 19 journals.

04:00:51 20 Q. Did you ever meet him?

04:00:53 21 A. I did. I sure did.

04:00:55 22 Q. Where was that?

04:00:55 23 A. In Wichita Falls. He did a seminar there at Midwestern

04:00:59 24 University. I think that's the name of the university in Wichita

04:01:02 25 Falls. So he invited me over to spend a few days with him at

04:01:07 1 Wichita Falls. So he showed me, as he taught the classes there,

04:01:14 2 how to group students.

04:01:17 3 MR. FELDMAN: Objection, your Honor. Nonresponsive.

04:01:18 4 THE COURT: Overrule the objection.

04:01:19 5 A. And, therefore, we went to that system.

04:01:25 6 Q. (BY MR. CASPAR) You went to the modified heterogeneous

04:01:27 7 grouping?

04:01:29 8 A. That's correct.

04:01:29 9 Q. So this system was something different from ability

04:01:30 10 grouping?

04:01:31 11 A. That's correct.

04:01:32 12 Q. When did you go to this heterogeneous grouping?

1:01:37 13 A. After an accreditation visit from the Texas Education

04:01:43 14 Agency.

04:01:43 15 Q. Well, around what years?

04:01:46 16 A. Oh, around 1989 -- '90.

04:01:49 17 Q. Around then?

04:01:50 18 A. Uh-huh.

04:01:53 19 Q. And so, you decided -- did you decide to do it because of

04:01:56 20 your meeting with the professor from Virginia?

04:01:58 21 A. We did, the modified heterogeneous group. Then, after the

04:02:02 22 visit from -- the Texas Education Agency, the accreditation

04:02:07 23 visit, then we went back to the peer heterogeneous grouping.

04:02:15 24 Q. So when you went back to the heterogeneous grouping, what

04:02:17 25 was the effect in Blackshear as far as the assignment of

04:02:20 1 students?

04:02:23 2 A. They were mixed.

04:02:23 3 Q. There were mixed academically?

04:02:25 4 A. Academically and --

04:02:27 5 Q. Were they mixed racially, as well?

04:02:29 6 A. -- racially, as well.

04:02:29 7 Q. So they no longer had the predominantly white classes?

04:02:33 8 A. No, we did not.

04:02:34 9 Q. Predominantly black classes separately?

04:02:44 10 A. Did not anymore.

04:02:44 11 Q. What was the reaction among parents in the community to your

04:02:44 12 going back to heterogenous grouping?

1:02:44 13 MR. FELDMAN: Objection.

04:02:46 14 THE COURT: Wait a minute. Did you object?

04:02:47 15 MR. FELDMAN: Yes, sir.

04:02:48 16 THE COURT: What's the objection?

04:02:48 17 MR. FELDMAN: The grounds that it's hearsay.

04:02:51 18 THE COURT: Overrule the objection.

04:02:52 19 MR. CASPAR: Your Honor, I would reiterate at this time

04:02:53 20 the Federal Evidence 803(20) permits this question.

04:03:00 21 THE COURT: Please proceed.

04:03:02 22 Q. (BY MR. CASPAR) You were talking about the reaction among

04:03:05 23 parents going back to heterogenous grouping?

04:03:07 24 A. Then, I noticed that parents continued to take their

04:03:12 25 children out but then, even more after we went back to the

04:03:16 1 heterogeneous grouping.

04:03:18 2 Q. Well, around when did parents start to really pull their

04:03:23 3 kids out of the school because of that?

04:03:27 4 A. '91, '92, somewhere there. '92 is when we --

04:03:34 5 Q. Had you been worried before that -- or had you had any

04:03:39 6 inclination that parents may do that?

04:03:39 7 A. Yes. Yes, we did. And I talked to -- if I might just go

04:03:45 8 ahead. I talked to the administration.

04:03:46 9 Q. The superintendent?

04:03:47 10 A. The superintendent about it and asked him what should I do.

04:03:50 11 What did he want me to do.

04:03:51 12 Q. What did he say?

1:03:51 13 A. He said, well, Norris, just do whatever you would like,

04:03:56 14 whatever you think is best. And he said, but I can tell you one

04:04:01 15 thing. If you mix the students the way that you are, many of

04:04:07 16 them are going to leave.

04:04:09 17 MR. FELDMAN: Your Honor, we object to all this

04:04:10 18 testimony as being pure hearsay.

04:04:12 19 THE COURT: The objection is overruled.

04:04:14 20 MR. CASPAR: It's not offered for any particular matter

04:04:16 21 asserted, your Honor; it's offered because that's his statement.

04:04:20 22 Q. (BY MR. CASPAR) Mr. McDaniel, did anybody else warn you

04:04:23 23 about what would happen if you heterogenously grouped?

04:04:26 24 A. Yes, teachers did. I had teachers who had students in

04:04:29 25 school and even had some parents.

04:04:34 1 Q. And what did they say?

04:04:36 2 A. They told me that if we continued, if I didn't put their

04:04:40 3 children with their friends, then they were going to have to take

04:04:43 4 their children out of school. And they visited me in my home,

04:04:46 5 and they visited me wherever they saw me, to tell me that if I

04:04:52 6 didn't change that school was going to go up the tube.

04:04:57 7 MR. FELDMAN: Objection to any statements of parents as

04:04:59 8 being hearsay.

04:05:00 9 THE COURT: Overrule the objection.

04:05:01 10 Q. (BY MR. CASPAR) Mr. McDaniel, did these warnings prove to be

04:05:05 11 true?

04:05:06 12 A. Yes, they did. I told the superintendent that if it was

04:05:12 13 going to be my call, then I would stick with what I felt was in

04:05:15 14 the best interest of the students, and he said okay.

04:05:20 15 Q. At some point, Mr. McDaniel, you became superintendent of

04:05:24 16 the Hearne schools; is that right?

04:05:25 17 A. Yes. That's right, sir.

04:05:27 18 Q. When was that?

04:05:28 19 A. 1996.

04:05:30 20 Q. And you went straight from being a principal at Blackshear

04:05:32 21 to the superintendent?

04:05:33 22 A. The superintendent, sure did.

04:05:35 23 Q. How were you selected for the job?

04:05:38 24 A. I was hired by the board.

04:05:40 25 Q. Did they take a vote to hire you?

04:05:42 1 A. They took a vote. Yes, sir.

04:05:43 2 Q. What was the racial makeup of the board at that time?

04:05:46 3 A. We had three African-Americans, three whites, and one

04:05:52 4 Hispanic.

04:05:53 5 Q. Well, given your 20-year, 25 years of experience at the

04:05:59 6 time, was it a unanimous vote to elect you?

04:06:00 7 A. No, it was not. It was not a unanimous vote.

04:06:04 8 Q. What was the vote?

04:06:06 9 A. Three African-Americans voted for me, three whites voted

04:06:10 10 against me, and the Hispanic voted for me.

04:06:13 11 Q. Okay. Were you the first black superintendent in Hearne

04:06:18 12 I.S.D?

04:06:18 13 A. Yes, I was.

04:06:19 14 Q. And you retired in 2002; is that right?

04:06:24 15 A. That's correct.

04:06:25 16 Q. Has there ever been another black superintendent?

04:06:27 17 A. No, there has not.

04:06:31 18 Q. I'd like to ask you about your responsibilities briefly as a

04:06:35 19 superintendent. So what did you do day-to-day as superintendent?

04:06:38 20 A. I had to oversee the overall operations of the district.

04:06:42 21 Q. Fair to say that you were sort of the CEO of the district?

04:06:45 22 A. CEO of the district, that's right.

04:06:46 23 Q. Did you go to all the board meetings?

04:06:48 24 A. I sure did.

04:06:48 25 Q. Did you have occasion to meet with a lot of parents?